Supreme Court, U. S.
FILED
JAN 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. ~~78-~~1090

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Big Three Industrial Gas & Equipment Co., Inc., prays for a Writ of Certiorari to review the September 15, 1978 judgment of the Fifth Circuit.

CITATIONS TO OPINION BELOW

The Fifth Circuit opinion is fully printed in the attached appendix, and is reported in ____Fed. 2d____. No opinion was written on rehearing.

OPINION BELOW

This Petition challenges the erroneous legal standard (exclusively a law issue) adopted by the Lower Court in order to hold that the Petitioner's maintenance force was wrongfully discharged in violation of Section 8(a)(3) of the National Labor Relations Act. (See opinion 6588, 6592).

The erroneous standard applied to support a finding of illegal motivation was defined by the Court (6591-92) as follows:

> Accepting the Board's finding of anti-union motivation, and yet assuming the existence of some legitimate business purpose, we are found with a decision activated by two goals: one legitimate, and one that we must condemn. *In this circuit, the threshold for illegality is crossed if the force of invidious purpose is "reasonably equal" to the lawful motive prompting conduct.* CRAMCO, INC. v. NLRB, 399 F.2d 1, 6 (5th Cir. 1968). While we cannot fix precise percentages for the motivational ingredients of Big Three's action, we do say that *the employer has failed to establish that business justification was dominant.* The Board dismissed Big Three's purported justification as a sham; *we find this justification subsidiary to the force of union animus in trigering the mass discharge.* Accordingly, the motivational predicate for § 8(a)(3) violations is established.

This standard was not employed by the Board; the Board relied on a pretextual finding to destroy Petitioner's nondiscriminatory motivation.

Footnote 15 of the Opinion admits this "reasonably equal" standard is in conflict with the First Circuit "but

for" standard in *Stone & Webster Engineering Corporation v. NLRB,* 536 F.2d 401 (First—1976).

This standard also conflicts with the "but for" standard applied many times in the Fifth Circuit, to-wit: *Florida Steel Corp. v. NLRB,* (Fifth Cir., 1976), 529 F.2d 1225, 1235, 92 LRRM 2040; *Sweeney & Co. v. NLRB* (Fifth Cir., 1971), 437 F.2d 1127, 1133, 76 LRRM 2321; *Southwest Latex Corp. v. NLRB,* (Fifth Cir., 1970), 426 F.2d 50, 55, 74 LRRM 2214.

The standard applied in the Fifth Circuit varies from panel to panel and from day to day.

The Fifth Circuit standard applied against Petitioner is like a ticket to a baseball game—good for today only. This Court should exercise its supervisory powers in order to settle the governing benchmark.

This is a new and novel standard in the Fifth Circuit; this circuit has many times applied other and different standards. In this circuit, Respondent cannot know the legal standard to be applied to measure its conduct under 8(a)(3).

The Opinion itself acknowledges that the Circuit has often applied different standards—e.g. the "but for" standard. (See Footnote 15)

The Opinion acknowledges the Petitioner established a lawful, nondiscriminatory reason for the discharges. The Court further found that Petitioner's lawful reasons were not pretextual but rather a contributing cause.

The standard applied by the Court was not the standard applied by the Board; the facts relied on by the Court were not found by the Board and were not relied on by the Board. The Court erroneously made new fact

findings; the Court had no power to make these fact findings. *S.E.C. v. Chenery Corp.*, 318 U.S. 80.

Although the legal standard for determining discrimination in 8(a)(3) illegal motivation cases is a question of first impression, the governing standard is well established in Civil Rights Title VII cases. In *McDonnel-Douglas Corp. v. Green* (1973) 411 U.S. 792 and adopted by the Fifth Circuit July 10, 1978 in *Parson v. Kaiser Aluminum Co.*, 17 FEP 1272, as follows:

> In a non-class claim of employment discrimination under Title VII, the plaintiff carries the initial burden of proving a prima facie case of discrimination. The elements of a prima facie case were delineated in McDonnell-Douglas Corporation v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677, 5 FEP Cases 965, 969; (i) the complainant must belong to a protected minority; (ii) must apply and be qualified for a job for which the employer is seeking applications; (iii) be rejected for the job; and (iv) the employer must then continue to seek applicants with the complainant's qualifications. When a plaintiff meets these criteria, the burden shifts to the defendant to show, by a preponderance of the evidence, *that it had legitimate, nondiscriminatory reasons for its decision*. If the defendant can meet this burden, the plaintiff must then prove, by a preponderance of the evidence, *that the articulated reason is a pretext for discrimination*. McDonnell-Douglas Corporation v. Green, supra, 411 U.S. at 802-804, 36 L.Ed.2d at 677-79, 5 FEP Cases at 969-970; Turner v. Texas Instruments, Inc., 5 Cir., 1977, 555 F.2d 1251, 1255, 15 FEP Cases 746,749. . . .

The Fifth Circuit refused to adopt *McDonnell* as the governing standard in 8(a)(3) Board cases; *McDonnell* is the proper standard in 8(a)(3) cases as well as Title VII cases. No reason exists for different standards to establish the reason for discharge.

The Lower Court acknowledged (1) legitimate non-discriminatory reasons (worker misconduct) for the termination, (2) legitimate reasons were a contributing cause of the discharge and not a pretext, and (3) Petitioner's "decision" was activated by two goals, "one legitimate and one we (Lower Court) must condemn."

JURISDICTION

On the 15th day of September, 1978, the Judgment, Appendix p. 5 was signed, entered and mandated; the Motion for Rehearing was filed on September 25, 1978.

On October 27, 1978, the Motion for Rehearing was denied (Appendix, p. 4). Jurisdiction is granted by 29 U.S.C. 160(e), 29 U.S.C. 160(f), and 28 U.S.C. 1254.

STATEMENT OF THE CASE

The Opinion acknowledges the employee misconduct attacking Petitioner; this misconduct created unbearable anxieties and tensions. See Opinion 6582.

The Board in its Brief 10-11, summarized the "reign of terror" inflicted on Petitioner as follows:

> A 2 x 4 piece of lumber was jammed into a water pump, resulting in damages of $1,200 to $1,300. In August a boiler was discovered with its internal parts ripped out, necessitating repairs amounting to $2,000 to $3,000 (A. 13; Tr. 486-488).
>
> On August 19 and 20, a series of threats and related conduct was directed against the Company and

some of its supervisors. First, early in the morning of August 19 Supervisor Richardson's life was threatened by an anonymous telephone caller, three shots were fired at his house, and he thought sugar had been placed in the gas tanks of his automobiles (A. 13-14; Tr. 453-454). At 8:30 p.m. the same day, while Hurt and other maintenance men were at work, a telephone bomb threat was received at the plant. The Company called police and fire units and evacuated its maintenance employees, but not its production employees (A. 14; Tr. 365-368, 418-422, 451-452, 460-461) While the bomb threat procedure was still in effect, a second threat was received, this time alleging that a bomb would go off at 6 o'clock the following morning (A. 14-15; Tr. 353). Early in the morning of August 20, however, two additional calls gave predicted explosion times of "3 o'clock sharp" and "about ten minutes" respectively. These calls, which were recorded on tape, resulted in continuation of the emergency procedures (A. 15; Tr. 427-432). The bomb threats did not interrupt production (A. 14-15, Tr. 368). Finally, at 8 o'clock that morning an anonymous caller telephoned the home of the maintenance superintendent and told his wife to "tell him to be careful" (A. 15; Tr. 356).

The court further acknowledged Petitioner's sorry plight, as follows (6582-3):

> While measures against union supporters pervade this case, they do not comprise the full story. Harm to the Company occurred as well, when, in July, lumber was jammed into a water pump causing damages of $1,200 to $1,300. Another act of apparent sabotage occurred in August as a boiler was discovered with its internal parts ripped out. This necessitated further repairs costing from $2,000 to $3,000. Then, on August 19 and 20 a series of threats were leveled against the Company and several of its supervisors.

The worst of it fell on Supervisor Richardson whose life was threatened by an anonymous telephone caller on the morning of August 19. Additionally, three shots were fired at his house, and sugar was placed in the gas tanks of his automobiles. Threatening phone calls were also made to the homes of other supervisory personnel and received by their wives causing great tension and anxiety. Further intensifying this wave of fear were several telephone bomb threats made to the plant on the evening of August 19 and on the next morning. As a result, the Company permitted the maintenance workforce to leave for the day on August 20. The operations working in order to prevent the inordinate expense and delay that any halt in production would have occasioned. Some investigation was made of these incidents by law enforcement officials and by the Company itself. However, no conclusive identifications of the actual wrongdoers resulted.[2] A report of these events was delivered to a Company Vice President on August 23 and on the following day, Company officials met to consider action to solve the problems surrounding the maintenance department.

At this meeting, the plant manager recommended that the maintenance department be replaced by a return to contract maintenance, the means utilized until 1975. On the next day, August 25, Company officials adopted this proposal without attempting to implement alternatives. Later that evening, the Company announced that the maintenance work would be subcontracted and that all thirty-four workers in the maintenance department would be discharged.

Although the Opinion acknowledged the threats to Petitioner's supervisors' wives caused "great tension and anxieties" (6583), the Opinion concludes the Petitioner was powerless to discharge the employees in order to protect the supervisors and their wives from threats, tensions and anxieties. The Act does not require Petitioner its supervisors and their wives to endure threats to life, tensions and anxieties. While the Opinion has great tolerance for the threats to kill Petitioner's supervisors, the Opinion requires the company to endure these threats until some mystical, undefined, breaking point is reached. This makes the law "too thin a dialectical enterprise".

This misconduct is referred to in the Opinion as a legitimate motive or reason for terminating the maintenance department. No one may reasonably question that Petitioner was entitled to take some action in response to the repeated threats and physical sabotage.

In direct conflict with the ultimate holding, the Lower Court found and acknowledged Petitioner's lawful motivation, to-wit (Op. 6588):

> . . . In the present case, *Big Three's drastic response was to misconduct by a few workers within the maintenance unit*—a condition that was neither inevitable nor incapable of differentiated response.

Petitioner has a lawful right to respond to the workers "REIGN OF TERROR"—this is plainly lawful motivation; yet, the Court condemned Petitioner's motivation.

The Court further acknowledges Petitioner's plight by stating (6589) "in the problem plagued maintenance department".

In truth and in fact the Lower Court did not condemn Petitioner's motivation so much as it condemned Petitioner's remedy; this is also made plain in the Opinion (6589), to-wit:

> Courts have long been loathe to countenance an infliction of punishment upon many for the misdeeds of a few. "Certainly all the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights." *Stewart Die Casting Corp. v. NLRB*, 114 F.2d 849, 856 (7th Cir. 1940). "The violence of these two employees . . . is not, however, to be imputed to [the] other union members in the absence of proof that identifies others as participating in such violence." *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 268 (6th Cir. 1945).

The remedy was not for the Board or Court; if properly motivated, Petitioner was free to select the remedy.

The Lower Court refused to apply the *McDonnell Douglas* governing legal standard, to-wit—The Board must properly find that the workers' misconduct and "reign of terror" was a pretext for discrimination.

The proper pretext finding was indispensable to enforcement; the Lower Court refused to uphold the Board's pretext finding; under the *McDonnell* standard (411 U.S. 792), a pretext finding supported by substantial evidence is indispensable to enforcement.

REASONS FOR GRANTING WRIT

The Opinion below is in conflict with the decisions of the First Circuit in *Stone & Webster v. N.L.R.B.*, 536 F.

(2d) 1976 and the Ninth Circuit in *Polynesian CC v. N.L.R.B.*, (July 1978), 99 LRRM 3416, ____F. (2d) ____ on the same issue—the standard governing discharge in violation of Article 8(a)(3) of the National Labor Relations Act. This Court's supervisory powers should be invoked to obtain uniformity of decisions.

The Opinion is also in direct conflict with the Fifth Circuit's opinions establishing a "but for" governing standard as in *Florida Steel Corp. v. NLRB*, (Fifth Cir., 1976), 529 F.2d 1225, 1236, 92 LRRM 2040; *Sweeney & Co. v. NLRB*, (Fifth Cir., 1971), 437 F.2d 1227, 1133, 76 LRRM 2321; *Southwest Latex Corp. v. NLRB*, (Fifth Cir., 1970) 426 F.2d 50, 55, 74 LRRM 2214.

The importance of a uniform standard in the Fifth Circuit as well as the other circuits cannot be questioned. The public loses respect for the law when the Board and courts use a different standard every day.

The transcendant importance of this governing standard for 8(a)(3) discharge cases may not be reasonably questioned; these cases are filed and prosecuted daily; since 1937, thousands of these cases have been prosecuted with no uniform application of the law; after 40 years, the Board and the public share a compelling need that the governing standard be finally settled by this Court.

The arbitrary refusal of the Lower Court to follow the *McDonnell* 411 U.S. 792 standard calls for an exercise of this Court's power of supervision.

In this case in Footnote 15, the Court acknowledges employing several different standards from time to time. In *Polynesian CC v. N.L.R.B.* (99 LRRM 3416) (Ninth

Circuit, July, 1978), the Ninth acknowledges the varying standards applied in the Ninth Circuit. Petitioner's case is a classic, textbook case calling for this Court to settle the law in an area looming large in the administration of the Act.

Forty years of administration of the Act without uniformity and without settling the 8(a)(3) governing standard is enough. This establishes a compelling necessity for granting of the Writ.

The Issues — The prime issue raised is the 8(a)(3) discrimination findings and holdings condemning Petitioner's termination of the entire maintenance department in favor of subcontracting in order to stop the "reign of terror, anxieties and tensions" at Petitioner's Bayport plant. The typical Board trivialities are not presented for review.

The Controlling Issues Are Plain, Sharply Defined, Law Issues —

1. The controlling legal standard to be applied to the finding of a discriminatory discharge by Respondent under Section 8(a)(3) of the National Labor Relations Act, after Petitioner proved a legitimate non-discriminatory reason (worker misconduct) for the discharges. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792.

2. The power of the Lower Court to apply a different legal standard and to find new facts to support the Board's conclusions, after rejecting the Board's indispensable finding that Petitioner's non-discriminatory reasons were pretextual. *S.E.C. v. Chenery Corp.*, 318 U.S. 80.

QUESTIONS PRESENTED

1. **In 8(a)(3) discharge cases, is the controlling standard, the standard of McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 192, to-wit, when the Petitioner established a legitimate, non-discriminatory reason for the mass discharges, the Board must prove Petitioner's non-discriminatory reason (the reign of terror) was a pretext for discrimination?**

2. **In 8(a)(3) discharge cases, is the governing standard—"the Reasonably Equal" Standard—applied by the lower court to the discharges of Petitioner's maintenance force? (See lower court Opinion 6591-2)**

3. **In 8(a)(3) discharge cases, is the governing standard, the same standard established for Title VII cases in McDonnell Douglas Corp. v. Green, 471 U.S. 792, to-wit—the Petitioner's assigned lawful reason (worker misconduct) must be found to be pretextual or discriminatory in its application?**

4. **In 8(a)(3) discharge cases, is the First Circuit's governing standard applied in Coletti's Furniture v. NLRB, 550 F.2d 1292 (First—1977) and in NLRB v. Electro Mart, 523 F.2d 410, (9th Cir. 1975) to-wit: the "but for" standard—the proper governing standard? (This standard has also been frequently applied in the Fifth Circuit)**

5. **In 8(a)(3) discharge cases, is the Ninth Circuit's governing standard followed in Polynesian Cultural Center v. NLRB, ____ Fed. 2d ____, 99 LRRM 3416, decided July 18, 1978, to-wit—the "moving cause" or "but for" standard—the proper governing standard? (This standard has also been frequently applied in the Fifth Circuit)**

6. **Did the Court have the power to sustain the Board action on different factual and legal grounds than the Board acted and relied on? NLRB v. Pipefitters, 429 U.S. 507, S.E.C. v. Chenery Corp., 318 U.S. 80**

7. **When the Court found the Board misconceived the law (did not apply Court's "reasonably equal" standard) and did not apply the proper legal standard, was the Court precluded from enforcing the Board Order on different legal grounds substituted by the Court? NLRB v. Pipefitters, 429 U.S. 507, S.E.C. v. Chenery Corp., 318 U.S. 80**

ARGUMENT UNDER McDONNELL DOUGLAS CASE POINT

As pointed out in the opinion (6588-9), the prime issue is whether the discharge of thirty-four maintenance employees in response to serious "worker misconduct" was discriminatory.

The Court's decision rejected the Board findings and conception of the law but enforced the Board's order by substituting a "proper basis"; the Court enforced but not on the pretext basis of the Board's Decision. This is

wrong, *S.E.C. v. Chenery,* 332 U.S. 194; *SEC v. Chenery,* 318 U.S. 80.

The Board relied entirely on its finding that the workers' misconduct was used by the Petitioner as a pretext for discriminatory discharges (ALJ-Decision-23) The Court rejected the Board's pretext finding with this statement:

> *Section 8(a)(3): The Discharge of Every Maintenance Worker*
>
> [12] The most serious violation of the Act found by the Board was the allegedly discriminatory discharge of all thirty-four workers in the maintenance department. The Company defended this termination as a necessary response to a rash of problems erupting in the maintenance unit during July and August. The Board rejected the Company's asserted justification as a deception painted over actions more accurately characterized as the retaliatory firing of union supporters. While we find some truth in the claims of both parties, considerations of policy and law compel affirmance of the Board.

The Court refused to uphold the unreasonable pretext finding of the Board, but the Court then proceeded to make new findings and plainly erroneous, new, legal standards for determining the reason and cause for the mass discharges.

The Court expressly found Petitioner discharges were in response to worker misconduct (6589):

> . . . In the present case, *Big Three's drastic response was to misconduct by a few workers within the maintenance unit*—a condition that was neither inevitable nor incapable of differentiated response.

This finding and holding is in direct conflict with the pretext holding of the Board; therefore, the basis of the Board's decision is a pretext finding, while the court fairly and squarely rejects this basis of the Board's Decision.

The Board's pretext finding is further set aside with this judicial finding (6591):

> However, even though we endorse the Board's finding of anti-union animus, we do not entirely discount the Company's assertions that honest business purposes contributed to its decision to subcontract. The Board did not specifically discredit the words of company officials who attested to the legitimacy of their business justification. Furthermore, we do not doubt that a company with a trouble-ridden workforce would want to eliminate further inconvenience and expense by eliminating the workforce. *Cf. NLRB v. R. C. Mahon,* 269 F.2d 44, 47 (6th Cir. 1959) (added costs of unionism a legitimate consideration). This seems especially plausible because the company had subcontracted its maintenance work in the past and only since 1975 had the Company directly employed people for the job.

The Court squarely credits Petitioner's honest business purpose; this destroys the Board's case, for the Board relied on a wholly dishonest pretext to make its discrimination case.

The Court squarely rejects the Board pretext finding, even though the Board's pretext finding is the cornerstone and sole basis for its decision.

After more than forty years of judicial review of Board 8(a)(3) discharge findings, the governing prin-

ciples to establish the reason or cause of discharge has never been settled by this Court. The governing principles are in chaos in the court below, because they vary from panel to panel and from case to case. If Petitioner is entitled to nothing else, it is entitled to have the governing standards settled and consistently applied.

The governing legal principles to determine the cause or reason for Petitioner's discharges of the maintenance force should be the same applied in Title VII cases and well settled in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792. In Title VII but not in Labor Board cases, the Fifth Circuit properly follows *McDonnell Douglas;* see *Parson v. Kaiser Aluminum,* ____F.2d____, 17 FEP 1272 (July 10, 1978) correctly defining the controlling principle (17 FEP 1278):

> In a non-class claim of employment discrimination under Title VII, the plaintiff carries the initial burden of proving a prima facie case of discrimination. The elements of a prima facie case were delineated in McDonnell Douglas Corporation v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677, 5 FEP Cases 965, 969: (i) the complainant must belong to a protected minority; (ii) must apply and be qualified for a job for which the employer is seeking applications; (iii) be rejected for the job; and (iv) the employer must then continue to seek applicants with the complainant's qualifications. When a plaintiff meets these criteria, the burden shifts to the defendant to show, by a preponderance of the evidence, that it had legitimate, nondiscriminatory reasons for its decision. If the defendant can meet this burden, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason is a pretext for discrimination. McDonnell Douglas Corporation v. Green, supra, 411 U.S. at 802-804, 36 L.Ed.2d at 677-79, 5 FEP Cases at 969-970; Turner v. Texas Instruments, Inc., 5 Cir., 1977, 555 F.2d 1251, 1255, 15 FEP Cases 746, 749.

The Fifth Circuit concedes Petitioner established a legitimate, nondiscriminatory reason for the discharges —worker misconduct. The lower court recognized the plain misconduct directed at terrorizing Petitioner (Op. 6582-3):

> . . . Additionally, three shots were fired at his house, and sugar was placed in the gas tanks of his automobiles. Threatening phone calls were also made to the homes of other supervisory personnel and received by their wives *causing great tension and anxiety*. Further intensifying this wave of fear were telephone bomb threats made to the plant on the evening of August 19 and on the next morning. As a result, the Company permitted the maintenance workforce to leave for the day on August 20.

The Court acknowledges Petitioner's supervisors and their families were subjected to great tension and anxiety. The court further finds Petitioner was helpless to relieve the anxieties and must endure the deliberately inflicted tension and anxiety. The lower court's empathy was limited to the workers with no empathy for the company supervisors. The opinion is so one-sided as to be unreasonable; the opinion disregards all Petitioner's rights to be free from fear and anxieties in favor of job security for employees.

The lower court failed to follow *McDonnell Douglas* (411 U.S. at 802-4) controlling requirement, a "pretext

finding", to set aside Petitioner's good faith, non-discriminatory reason. For this reason, the lower court should be reversed, and the governing, legal principles of *McDonnell Douglas* should be applied to Petitioner and adopted for all 8(a)(3) cases.

The Lower Court did not accept any well known "controlling benchmark" for determining the cause or reason for the 8(a)(3) discharge claims. The Lower Court disregarded its own decisions and, in conflict with all other circuits, invented a new, unreasonable and unworkable governing standard (6591-2):

> Accepting the Board's finding of antiunion motivation, and yet assuming the existence of some legitimate business purpose, we are found with a decision activated by two goals: one legitimate, and one that we must condemn. In this circuit, the threshold for illegality is crossed if the force of invidious purpose is "reasonably equal" to the lawful motive prompting conduct. *Cramco, Inc. v. N.L.R.B.* 399 F.2d 1, 6 (5th Cir. 1968).[15] While we cannot fix precise percentages for the motivational ingredients of Big Three's action, we do say that the employer has failed to establish that business justification was dominant. The Board dismissed Big Three's purported justification as a sham; we find this justification subsidiary to the force of union animus in triggering the mass discharge. Accordingly, the motivational predicate for § 8(a)(3) violations is established.[16]

No sooner does the court adopt the "reasonably equal" benchmark than the court declared it unworkable, to-wit: " . . . we cannot fix precise percentages for the motivational ingredients of Big Three's action . . ." if the percentages cannot be fixed, the "reasonably equal percentage" cannot be fixed. The new Fifth Circuit standard is unworkable, pious nonsense.

Since neither the Board nor Court can divide motivation into percentages, the standard is fanciful and unworkable. No other circuit has adopted this fanciful, unworkable notion. This is the medieval equivalent of speculation about the number of angels dancing on a pinhead.

The present conflict in the circuits is well established by the Ninth Circuit, *Polynesian C.C. v. NLRB* (July 18, 1978) 99 LRRM 3416, ____F.2d____, reciting the absence of a settled standard, as follows (99 LRRM 3421):

> The difficult issue presented here is whether the ALJ and the Board employed the proper legal standard when there exist multiple motives for a discharge. Several of our cases have said that the discriminatory motive must be the moving cause of the discharge. Western Exterminator v. NLRB, 565 F.2d 1114, 97 LRRM 2187 (9th Cir. 1977); NLRB v. West Coast Casket Co., Inc., 469 F.2d 871, 81 LRRM 2857 (9th Cir. 1972); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 76 LRRM 2224 (9th Cir. 1970). This is a different, and possibly more demanding standard than the but-for approach of the ALJ and the Board. On the other hand, this court has indicated that it too, on occasion, employs the but-for approach. See NLRB v. Klaue, 523 F.2d 410, 90 LRRM 2678 (9th Cir. 1975). These circumstances would give us pause were it not for the fact that our review of the record convinces us that any difference in the standard between that of "moving cause" and that employed by the ALJ

> and the Board is without operative significance. We reach this conclusion because on the record we find that the discriminatory purpose was the moving cause of, as well as the dominant motive behind, the discharge.

The Ninth Circuit uses a "moving cause" and "but for" standard. After forty years of judicial administration the controlling standard is not settled; the controlling standard vacillates from panel to panel and from day to day; forty years of administration without a settled standard, like three generations of imbeciles, is enough. This Court should settle the standard by adopting its *McDonnell Douglas* standard in 8(a)(3) cases.

The Ninth Circuit pinpoints the basic problem (*Polynesian C.C. v. NLRB*, 99 LRRM 3421 (Ninth Circuit —July 1978)), thusly:

> Direct evidence of motive rarely exists. Inferences from the evidence almost universally are the only way of determining motive. . . .

Since evidence of illegal motive is difficult, the lower court sought a subjective standard that would render conviction of employers EASY. This is in direct conflict with the Court's view of subjective promotion decisions of employers in Title VII cases. The employer is entitled to a fair shake, while the lower court attempts to adopt only rules to make discriminatory finding against employers easy. This is plainly wrong.

The Fifth Circuit acknowledged in Footnote 15, that the Fifth Circuit had no settled rule, after forty years of decisions; see Opinion 6592 stating:

> 15. *See also NLRB v. Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1006 (5th Cir. 1965); *NLRB v. Hudson Pulp & Paper Co.*, 273 F.2d 660, 666 (5th Cir. 1960). In fact, the threshold for illegal motive may not require a "reasonable equality," but may, according to some cases, be met if invidious purpose is part of the decision at issue. *NLRB v. O. A. Fuller Super Mkts., Inc.*, 374 F.2d 197, 200 (5th Cir. 1967); *NLRB v. American Mfg. Co. of Texas*, 351 F.2d 74, 79 (5th Cir. 1965). This less exacting standard represents the prevailing view among other circuits. *Jeanette Corp. v. NLRB*, 532 F.2d 916, 920, n.5 (3d Cir. 1976); *NLRB v. Elias Bros. Restaurants, Inc.*, 496 F.2d 1165, 1167 (6th Cir. 1974); *NLRB v. Central Press of Cal.*, 527 F.2d 1156 (9th Cir. 1975). The most exacting test is the preponderant motive or "but for" standard of the First Circuit. *Stone & Webster Engineering Corp. v. NLRB*, 536 F.2d 461, 464-465 (1st Cir. 1976). While Judge Thornberry has ably refuted any contention that such a strict test operates in this circuit, *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1263-1265 (Thornberry, J., specially concurring), even a "but for" test would be met in the instant case.

The Ninth Circuit standard is obviously mistated (*Polynesian CC* above); the Fifth Circuit obviously has no standard whatsoever, because the standard applied varies at random between panels; the current panel knew of no controlling standard but strongly opted against the most exacting test ("but for") in favor of the least exacting standard.

It never occurred to the current panel that the fair and objective *McDonnell Douglas* standards should be applied.

The First Circuit rejects the Fifth Circuit "reasonably equal" benchmark in favor of the "but for" standard. See

Coletti's Furniture v. NLRB (First, 1977), 550 F.2d 1292, 94 LRRM 3071 and *Stone & Webster Engineering Corp. v. NLRB*, 536 F.2d 461, 464-465 (First Circuit, 1976).

The Board made no finding complying with the "BUT FOR" test; the Court's "but for" finding is beyond its jurisdiction and plainly wrong. The Court made the "but for" finding because of a well founded lack of confidence in its own "reasonably equal" standard.

The necessity for judicial fact finding conclusively establishes that the Board's order should not be enforced; the Board's order must stand or fall on the Board's findings, and the Board's interpretation of the law. The Court has no jurisdiction to find facts nor to introduce new legal concepts so as to enable the Court to enforce the Board's order.

The Court's Finding Requires That Enforcement Be Denied — One of the Court's findings precludes its enforcement of the Board's order, to-wit:

> ". . . In the present case, Big Three's drastic response was to misconduct by a few workers within the maintenance unit—a condition that was neither inevitable nor incapable of differentiated response."

This squarely finds that worker misconduct was the Company's motive; this is as far as the Court may rightfully go. The Court has no rightful supervision over any properly motivated response.

However, the Court condemns the nature of the response; the kind of response is for the Company to decide; The Court has no right to condemn the Company's remedy, if rightfully motivated.

The Court's assumption that discharge is necessarily bad is also plainly wrong; in many instances discharge helps an employee find his proper notch in the world; discharge is not necessarily bad for anyone. This panel accepted this routine humbug—discharge is always bad for the employee—without evidence and based on intuition only.

The Court admits Respondent was entitled to respond to the employee mischief, and simply condemns the nature of Respondent's response. THIS IS WRONG AND ERRONEOUSLY ENLARGES THE COURT'S PROPER INQUIRY BEYOND MOTIVATION. THE REMEDY IS FOR PETITIONER, NOT THE BOARD.

The nature of the remedy for the mischief is well within the freedom still allotted to the Respondent.

The Fifth Circuit's inconsistent standards are made plain by:

> *Florida Steel Corp. v. NLRB*, (5 Cir. 1976) 529 F (2d) 1225, 1235, 92 LRRM 2040 ("but for" standard)
>
> *Sweeney & Co. v. NLRB*, (5th Cir. 1971), 437 F(2d) 1127, 1133, 76 LRRM 2321 ("but for" standard)
>
> *Southwest Latex Corp. v. NLRB* (5th Cir. 1970) 426 F(2d) 50, 55, 74 LRRM 2214 ("but for" standard)
>
> *NLRB v. Whitfield Pickle Co.*, (5 Cir. 1966), 374 F.2d 576, 64 LRRM 2661 (adopting the "but for" test in discriminatory motivation).
>
> *Frosty Morn Meats, Inc. v. NLRB*, (5 Cir. 1961) 296 F.2d 617, 621, 49 LRRM 2159 (adopting the "but for" test).

Reading & Bates v. NLRB, 403 F.2d 9, 69 LRRM 2675 (cause without which the employee would not be discharged).

NLRB v. Great Dane Trailer, 363 F.2d 132, 134, 62 LRRM 2457 (5 Cir. 1966) (reasonable inference of legitimate motive overrides inference of illegal motive.)

In Footnote 15, the opinion cites contrary Fifth Circuit decisions. However, the "but for" decisions are not mentioned. Forty years without uniformity is enough.

After more than forty years of administration of the Act, this Court should settle the "governing standard" and end the confusion, doubt, conflicts and uncertainties.

The Lower Court very seriously under-estimated the rebuttal weight to which the Petitioner's nondiscriminatory reasons were entitled. Nothing in 8(a)(3) requires Petitioner to endure the "reign of terror" to which it was subjected.

The detailed campaign of fear, threats, sabotage and intimidation fully justified Petitioner's conduct.

The Fifth Circuit's governing standards were clearly erroneous, and this case should be reversed.

ARGUMENT UNDER CHENERY CASE POINT

The Court did not follow the Board's governing legal standards nor fact findings, but the Court substituted a new legal standard with new fact findings. The "reasonably equal" standard was not mentioned in the Board decision (Appendix at Page 22-23):

> On the other hand, there is a virtual dearth of evidence in this record which supplies an unlawful motive for the mass discharges on August 24th . . . *those activities were a motivating reason if not the sole motivating reason, for the termination of the maintenance force.*
>
> The pretextual nature of the reasons assigned by Respondent for the mass terminations on August 25th is revealed in part by the fact that it terminated all the maintenance employees rather than just those it suspected in connection with the August 19 and 20th activities.

These Board's governing standards (a motivating reason and pretext) were rejected in favor of the Court's "reasonably equal" standard. When the Court rejected the legal basis of the decision, enforcement should have been denied.

The Court substituted its "reasonably equal" standard for the Board's "a motivating reason" and "pretextual" standard. The Court then substituted its new fact findings for the Board's meaningless fact findings. This is plainly wrong. *SEC v. Chenery Corp.*, 318 U.S. 80.

The Board's governing standard is (1) was the union "a motivating reason", and (2) was Petitioner's nondiscriminatory reason a pretext. The Court rejected the Board's standard and squarely rejected the Board's pretext finding. Since the Board's governing standard is erroneous and the pretext finding rejected, the enforcement should have been denied.

The Court rejected the Board's governing standard but nonetheless enforced the Board Order; since the Board admittedly did not employ a proper standard, its decision may not be reasonably enforced.

Plainly, the grounds upon which the Lower Court enforced the Board's Order were not the grounds upon which the Board Order was based. This was plainly wrong. *SEC v. Chenery Corp.*, 318 U.S. 80 plainly so states:

> Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> *[88]
>
> *In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245, 82 L.Ed 224, 229, 58 S Ct 154. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be

> made to do service for an administrative judgment. For purposes of aflirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

The Board never acted on the "reasonably equal" motivation finding of the Court; the Court rejected the Board's pretext finding which was the ground relied on by the Board.

The Court found the Petitioner established a legitimate, non-discriminatory reason for the discharge. The Board arbitrarily found this reason pretextual without evidence or reason.

The Board's governing standard is almost non-existent, but no legally acceptable standard was followed by the Board; the Board's application of erroneous legal standards means the Board's Order cannot stand; see *Chenery*, 318 U.S. 80, 94:

> Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.

The Board's misconception of the governing standard establishes that the Board's Order may not stand. The rejection of the Board's "pretext finding" as arbitrary by the Court also establishes the Order may not stand.

The vitality of *Chenery Corp.* was recently acknowledged in *NLRB v. Pipefitters,* 429 U.S. 507 at 522 (1977), as follows:

> 9. [8b, 9b] "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." SEC v. Chenery Corp. 318 U.S. 80, 95, 87 L.Ed. 626, 63 S.Ct. 454 (1943). This rule has not been disturbed. See FPC v. Texaco, Inc. 417 U.S. 380, 397, 41 L.Ed.2d 141, 94 S.Ct. 2315 (1974); FTC v. Sperry & Hutchinson Co. 405 U.S. 233, 249 31 L.Ed.2d 170, 92 S.Ct. 898 (1972); K. Davis, Administrative Law Treatise § 16.01, p. 397 (Supp. 1976). When an administrative agency has made an error of law, the duty of the Court is to "correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law." ICC v. Clyde S.S. Co. 181 U.S. 29, 32-33, 45 L.Ed. 729, 21 S.Ct. 512 (1901).

The vitality of Chenery was also confirmed in *Atchison, Topeka & Santa Fe v. Wichita Board of Trade,* 412 U.S. 800, 806, 807.

The Lower Court's sustaining of the Board's Order while rejecting the legal and factual grounds upon which the Board acted is plainly wrong. *NLRB v. Pipefitters,* 429 U.S. 407; *SEC v. Chenery Corp.,* 318 U.S. 80.

The Lower Court's Fact Findings Are Without Jurisdiction And Improper Under The Substantial Evidence Review — Multiple motivation was not found but denied by the Board; in finding two motives, the Court substituted its judgment and findings for the Board's findings; the Court had no right to substitute its findings for the Board's. The Court made several other fact findings contrary to the Board, although the Court plainly had no fact finding jurisdiction.

When the Court found the Board's pretext finding and exclusive motivation finding were without the support of substantial evidence the Board's order could not be lawfully enforced; the Court should have denied enforcement or remanded for further findings with appropriate instruction. *SEC v. Chenery Corp.,* 318 U.S. 80.

The Board found only one motive (anti-union), and further found the company's workers' misconduct motive claim was a pretext; the Court found these findings of the Board were unsupported by substantial evidence. The Board's order was enforced based solely on new and substituted findings by the Court. THIS IS PLAINLY WRONG. *NLRB v. Pipefitters,* 429 U.S. 507, *SEC v. Chenery Corp.,* 318 U.S. 80.

The Court has no jurisdiction to find facts, but nonetheless its substituted fact findings are plainly stated in the decision:

> 1. . . . The Board rejected the Company's asserted justification as a deception painted over actions more accurately characterized as the retaliatory firing of union supporters. *While we find some truth in the claims of both parties,* considerations of policy and law compel affirmance of the Board. . . .

(The Board did not find any truth in the Company's legal motivation claims, and this finding is denounced by the Court).

2. . . . In the present case, *Big Three's drastic response* was to misconduct by a few workers within the maintenance unit—a condition that was neither inevitable nor incapable of differentiated response. . . (The Court squarely finds a lawful motivation—response to misconduct).

3. Accepting the Board's finding of anti-union motivation, and yet assuming the existence of some legitimate business purpose, we are found with a decision activated by two goals; one legitimate, and one that we must condemn. In this circuit, the threshold for illegality is crossed if the force of invidious purpose is "reasonably equal" to the lawful motive prompting conduct. (The Board made no "reasonably equal" finding under this standard)

4. . . . While we cannot fix precise percentages for the motivational ingredients of Big Three's action, we do say that the employer has failed to establish that business justification was dominant. (Respondent had no burden of proof; the burden of proof is always on the Board). See *NLRB v. Walton Manufacturing Co.*, 47 LRRM 2367 (5 Cir. 1961); *NLRB v. McGahey*, 233 F.2d 406 (5 Cir. 1956); substanti..l evidence cannot be based on the lack of evidence. The Board made no dominant finding.

5. . . . *we find* this justification *subsidiary* to the force of union animus in triggering the mass discharge. (This is a court finding; the Court's fact finding under substantial evidence review is manifestly wrong. The Board made no such finding).

6. "Even a 'but for' test would be met in the instant case." (This is a Court finding not a Board finding; the Court has no fact finding function. Neither the Court nor the Board employed a "but for" standard. This finding's exclusive purpose was to prevent certiorari).

In a nutshell, the Court disagreed and disregarded the Board's findings and substituted new findings made by the Court; this is a surprising repudiation and misuse of the substantial evidence rule. *SEC v. Chenery Corp.* 318 U.S. 80.

CONCLUSION

The reasons for granting the Writ are self-evident. First, the Board and the Courts of Appeal are using several different governing standards for determining discriminatory motive in discharge cases under the National Labor Relations Act. These discharge cases loom very large in the administration of the Act. In the Petition, Petitioner has pointed out that the Fifth Circuit alone has used a "reasonably equal", a "but for", a "dominant motive", a "motivating cause", and "any part of the reason is discriminatory" as governing standards. The Fifth Circuit vacillates from one governing standard to another, as if the law was wax in the Court's hands to be reshaped to fit each case. Therefore, in the Fifth Circuit, at least, the law is not a chart to govern employer conduct but is a game of chance, depending upon what governing standard is fortuitously applied. This causes the administration of justice to fall into disrepute. In making a decision to discharge its maintenance force, Petitioner could not possibly guess that the Fifth Circuit would use a "reasonably equal" motivation standard. The history of 8(a)(3) discharge cases in the Fifth Circuit

clearly indicated a "but for" test might be the governing standard.

The First and Ninth Circuits have rather consistently used a "but for" standard which is in direct conflict with the standard employed by the Fifth Circuit in this case.

The governing standard in discharge cases is of transcendent importance; there are very few cases that are litigated more frequently than 8(a)(3) discriminatory discharge cases; a proper governing standard looms very large in the daily administration of the Act.

The law should be settled by this Court's extension of *McDonnell Douglas*, 411 U.S. 792, to the instant case. Section 8(a)(3) does not require a more difficult or different standard from that required in Title VII cases.

Moreover, the "reasonably equal" motivation standard is unworkable; a percentage division of the mind's motivations is not subject to accurate fact finding by the Board or anyone else.

The Lower Court's absolute refusal to review the Board's decisions based on the Board's fact findings and the Board's interpretation of the law is an unwarranted departure from the law that has been well settled for many, many years by *Chenery*, 318 U.S. 80; in order to eliminate conflicts in the circuits, in order to bring a nationwide uniformity to the administration of the National Labor Relations Act, and in order to eliminate uncertainty and confusion, it is imperative that this Court exercise its power of supervision over the Fifth and other circuits.

If this Court does not exercise its powers of supervision, the Board and the Courts of Civil Appeals will continue

to sail an unchartered sea of doubt applying first one governing standard and then another without regard to any consistent, controlling legal standard.

After forty years of doubt and uncertainty, it is time that the governing standard be settled, confusion and doubt be eliminated, and the Board and the lower courts be required to apply the *McDonnell Douglas* standard, a sound, workable standard, for the Board as well as the EEOC in discharge cases. The Fifth Circuit's refusal to require a pretext finding to destroy a lawful motivation is clearly wrong; this requires correction by this Court.

PRAYER

In order to eliminate conflicts, inconsistencies, vacillations, and uncertainties arising from inconsistent contemporaneous decisions of the Board and various Courts of Appeals, and more especially, to settle two important points of law looming large in the administration of the National Labor Relations Act, Petitioner respectfully prays that this Court grant a Writ of Certiorari and reverse the Decision of the Court below.

Respectfully submitted,

VICKERY LAW CORPORATION

CHARLES R. VICKERY, JR.
2001 Southern National Bank Bldg.
Main & McKinney
Houston, Texas 77002
659-8906

CERTIFICATE OF SERVICE

Copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon counsel for the Respondent, National Labor Relations Board, by mailing same to Mr. Elliott Moore, Counsel, Washington, D. C. on this the _____ day of January, 1979.

VICKERY LAW CORPORATION

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Main & McKinney
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX "A"

29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activties except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1) and (3):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership

therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 160(e):

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation,

any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings,

which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(f):

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall

have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
Fifth Circuit

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Office of the Clerk

October 27, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2592—NATIONAL LABOR RELATIONS BOARD vs. BIG THREE INDUSTRIAL GAS & EQUIPMENT CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ SALLY HAYWARD
Deputy Clerk

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-2592

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO.,
Respondent.

JUDGMENT

Before MORGAN and GEE Circuit Judges, and KING, District Judge.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Big Three Industrial Gas & Equipment Co., Houston, Texas, its officers, agents, successors, and assigns on June 23, 1977. The Court heard argument of respective counsel on March 20, 1978, and has considered the briefs and transcript of record filed in this cause. On August 24, 1978, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order. In conformity therewith it is hereby

---

* United States District Judge for the Southern District of Florida, sitting by designation.

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Big Three Industrial Gas & Equipment Co., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Costs are taxed against respondent.

ENTERED: SEP. 15, 1978

Issued As Mandate: Nov. 6, 1978.

APPENDIX "D"

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO., Respondent.

NO. 77-2592.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Aug. 24, 1978

The National Labor Relations Board petitioned for enforcement of its decision and order against an employer. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that: (1) on the record, antiunion conduct perpetrated by company supervisors was imputable to the employer, despite low company rank of the supervisors; (2) purpose violative of the National Labor Relations Act could be inferred from the fact that, although three workers disobeyed a company rule, the supervisor reported only the two union supporters and told a third worker not to worry because the company was not after him, and (3) though there was some truth in claims of both union and employer the Board could find that discharge of all 34 workers in the maintenance department was discriminatory though the company claimed that such termination was a necessary response to a rash of problems erupting in the maintenance unit, and, the Court of Appeals finding the employer's decision to have been

activated by one legitimate goal and one to be condemned, the threshold for illegality was whether force of indivious purpose was reasonably equal to lawful motive prompting conduct, and the employer failed to establish that business justification was dominant.

Enforced.

Gee, Circuit Judge, filed a specially concurring opinion.

Application for Enforcement of an Order of the National Labor Relations Board.

Before MORGAN AND GEE, Circuit Judges, and KING, District Judge.*

LEWIS R. MORGAN, Circuit Judge:

This case comes before the court on petition by the National Labor Relations Board for enforcement of its decision and order in *Big Three Industrial & Gas Equipment Co.*, 230 NLRB No. 48 (1977). The Board found that the respondent Big Three violated § 8(a)(1) and § 8(a)(3) of the National Labor Relations Act. We must decide whether principles of law and substantial evidence support the determinations of the Board.

The controverted. actions and issues arise from a summer, 1976 union drive among workers at the employer's Bayport plant in Pasadena, Texas. At this plant, Big Three manufactured oxygen, acetylene and nitrogen employing a workforce divided into two departments: maintenance workers and operations personnel. From the very beginning, union enthusiasm captured the maintenance department.[1] On July 1, 1976, a maintenance worker contacted a representative of Oil, Chemical and Atomic Workers, International Union, AFL-CIO to learn about union organizing. Authorization cards were obtained on July 14, and, by the end of the following day, twenty-seven employees, primarily in maintenance, had signed.

From others at the Bayport plant came a very different response. A daunting array of statements by Company supervisors alternately threatened union supporters while offering rewards for union opponents. This barrage commenced on June 29 as Supervisor Lindsay told a worker that a union was "a good way for all of us to get fired," and continued through August 20 when, in reference to the union, Supervisor Richardson told a worker, "You're going to get fired just as sure as the world goes around . . . They're going to run everybody and bring in contract maintenance." In addition to threatening union supporters, Big Three operatives dangled rewards before potential union opponents. On several occasions, supervisors indicated to employee Judd that his opposition to the union was well known and thoroughly appreciated. Workers in the operations department were apparently told that they would receive a 40-cent per hour wage increase in exchange for opposing the union.

Not surprisingly, the impetus behind the union drive began to fade. Although 33 of some 35 employees in the maintenance department eventually signed cards, little union zeal emanated from the operations unit. On August 2, with the union campaign at least temporarily stalled,

* United States District Judge for the Southern District of Florida, sitting by designation.

1. The immediate catalyst for the union campaign was the employer's plan to lay off four people in maintenance due to overstaffing in that department.

two of its leaders approached the Company's General Manager, Sid Peters, to suggest the formation of a Company union or committee. Peters flatly rejected this proposal. Efforts to unionize were resumed but with less force than before and with few or no signatures added after August 2.

This diminution of unionist energies, however, did not engender a corresponding reduction in the strident opposition by the Company. On August 9, Supervisor Richardson told union leaders Hurt and Robb they would never get anywhere in the Company because of their activities, and he suggested they find jobs elsewhere. Richardson also disclosed the operation of an anti-union spy, Jim Bowlin, who it was later reported, had been promised a supervisory position in exchange for information about union supporters. On August 17, Richardson told an employee that Bowlin had given the supervisors the names of all employees who signed union cards.

On that same day, amid this continuing background of subtle coercion and outright threats, three employees working overtime ignored a Company directive that they eat dinner on the premises and not leave the plant without punching out or notifying a supervisor. Two of the workers, William Fairless and John Coryell, had signed union cards. The third Lee Judd, had not. Although Supervisor Richardson observed all three breaking the Company rule, he reported only Fairless and Coryell for disciplinary action. The next day Assistant Superintendent Borey, on Richardson's recommendation, suspended Fairless and Coryell for three days. Later that day, Richardson told the non-unionist rule breaker, Judd, not to leave the plant again without punching out, but added, "Don't worry about it, though. We're not after you."

While measures against union supporters pervade this case, they do not comprise the full story. Harm to the Company occurred as well, when, in July, lumber was jammed into a water pump causing damages of $1,200 to $1,300. Another act of apparent sabotage occurred in August as a boiler was discovered with its internal parts ripped out. This necessitated further repairs costing from $2,000 to $3,000. Then on August 19 and 20 a series of threats were leveled against the Company and several of its supervisors.

The worst of it fell on Supervisor Richardson whose life was threatened by an anonymous telephone caller on the morning of August 19. Additionally, three shots were fired at his house, and sugar was placed in the gas tanks of his automobiles. Threatening phone calls were also made to the homes of other supervisory personnel and received by their wives causing great tension and anxiety. Further intensifying this wave of fear were several telephone bomb threats made to the plant on the evening of August 19 and on the next morning. As a result, the Company permitted the maintenance workforce to leave for the day on August 20. The operations workers, however, elected to continue working in order to prevent the inordinate expense and delay that any halt in production would have occasioned. Some investigation was made of these incidents by law enforcement officials and by the Company itself. However, no conclusive identifications of the actual wrongdoers resulted.[2] A report of these events was delivered to a Company Vice President on

2. Two telephone bomb threats had been recorded; however, no conclusive identification of the perpetrators resulted. Two witnesses reported the caller to be union advocate, Mike Robb. The assistant maintenance supervisor identified the voice as that of alleged Company spy, Jim Bowlin.

August 23 and on the following day, Company officials met to consider action to solve the problems surrounding the maintenance department.

At this meeting, the plant manager recommended that the maintenance department be replaced by a return to contract maintenance, the means utilized until 1975. On the next day, August 25, Company officials adopted this proposal without attempting to implement alternatives. Later that evening, the Company announced that the maintenance work would be subcontracted and that all thirty-four workers in the maintenance department would be discharged.

From these and similar developments, the Board found that the Company perpetrated unfair labor practices during the period from the launching of the union drive through the mass discharge of the maintenance workforce. The assorted threats, interrogations, promises of benefits and creation of an impression of surveillance constituted violations of § 8(a)(1). The suspension of workers Fairless and Coryell was held to be antiunion discrimination within the proscription of § 8(a)(3). Finally, the mass discharge of all maintenance workers, which the Board found to be motivated by anti-union animus, was found to be a further violation of § 8(a)(3). After separately examining each alleged violation, we find the Board's determination to be supported by substantial evidence and consistent with the applicable law. We therefore enforce its decision and order.

Section 8(a)(1): Threats, Promises and Supervisory Status

Section 8(a)(1) of the National Labor Relations Act prohibits employers from interfering with, restraining, or

coercing employees in the exercise of the rights to organize and bargain collectively. 29 U.S.C. § 158(a)(1). The Board identified more than a dozen acts of unlawful interference ranging from subtle intimation of advancement for workers who rejected the union, to crude threats of closing the plant should organizational efforts succeed. Additionally, the Board found that coercive interrogations had occurred in contravention of *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) and that the Company had created an impression of surveillance by the alleged spy, Jim Bowlin. These words and deeds could not fail to inhibit organizational efforts. Indeed, the Company does not contend that these acts were innocent, but rather argues that the supervisors responsible did not speak or act for the Company. The Administrative Law Judge found that because the operatives in question were supervisors within Section 2(11) of the Act, the Company is responsible for their conduct.

[1, 2] We begin our assessment of the scope of Big Three's imputed liability by acknowledging the manifest supervisory status of Lindsay, Osborn, Richardson, and the others. These men were held to be supervisors by the Board and we owe deference to this resolution of a fact question and a matter of practical application by the Board to the infinite gradations of authority within a particular industry. *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961). Testing such findings against the standard of substantial evidence, we observe that Lindsay, Park, Richardson and Osborn were empowered to interview job applicants, grant time off, allocate overtime work, transfer employees and recommend wage increases. This authority unquestionably brought them within the

criteria of Section 2(11).[3] Additionally, the men who the Company currently seeks to disavow were called supervisors, were regarded as such by both workers and higher management and even wore white hats to distinguish themselves from other employees. The case for supervisory status is compelling; it easily suffices as substantial evidence.

[3-5] However, the fact that perpetrators of anti-union interference are supervisors for Section 2(11) purposes may not conclusively establish an employer's liability. The definition contained in § 2(11) does not, by its terms, delineate parameters of managerial liability.[4] Instead, this provision describes persons who are supervisors for purposes of excluding them from various protections of the Act that other workers enjoy. *Beasley v. Food Fair of North Carolina,* 416 U.S. 653, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974). Moreover, in *NLRB v. Link-Belt Co.,* 311 U.S. 584, 599, 61 S.Ct. 358, 366, 85 L.Ed. 368, 378-379 (1940), the Supreme Court said:

3. Section 2(11) of the Act defines a supervisor as:
> . . . any individual having the authority, in the interest of the employer, to hire, transfer, . . . assign, reward or discipline other employees, or responsibility to direct them . . . or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Courts have repeatedly emphasized that these criteria are enumerated disjunctively so that the possession of any single function will suffice. *E. g., NLRB v. Security Guard Service, Inc.,* 384 F.2d 143, 146-147 (5th Cir. 1967).

4. The statutory definition of "employer" includes "any person acting as an agent of an employer, directly or indirectly" and does not use the term "supervisor." 29 U.S.C. § 152(2). Accordingly, the statutory test for imputing liability is based upon principles of agency to be applied expansively in accordance with the underlying policy of the Act. *See Furr's, Inc. v. NLRB,* 381 F.2d 562, 567 (10th Cir.) *cert. denied,* 389 U.S. 840, 88 S.Ct. 70, 19 L.Ed.2d 105 (1967).

> If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere.

Thus, even if perpetrators of anti-union conduct are § 2(11) supervisors, the specific conduct at issue must be cloaked with the employer's authorization. However, while supervisory acts are not conclusively imputed to the employer, lower court decisions subsequent to *Link-Belt Co.* frequently assume that when supervisors act, they act for the employer: "If they are supervisors, the Company is responsible for their conduct." *Amalgamated Clothing Workers v. NLRB,* 124 U.S.App. D.C. 365, 376, 365 F.2d 898, 909 (1966). *See also NLRB v. Kaiser Agr. Chem. Div. of Kaiser A&C Corp.,* 473 F.2d 374, 384 (5th Cir. 1973); *NLRB v. American Mfg. Co. of Texas,* 351 F.2d 74, 78 (5th Cir. 1965). The force of presumption is evinced by the methodology of these cases if not their express terms.[5]

[6, 7] Accordingly, we find in the present case that because the guilty actors are supervisors, Big Three is

5. *See also Jays Foods, Inc. v. NLRB,* 573 F.2d 438, 445 (7th Cir. 1978); *Altman Camera Co. v. NLRB,* 511 F.2d 319, 321 (7th Cir. 1975) (since no repudiation of supervisors, company was liable): *International Union of E. R. & M. W., AFL-CIO v. NLRB,* 138 U.S. App. D.C. 249, 426 F.2d 1243, 1246 (1970).

Other cases focus on the alleged illegality of supervisory acts while assuming, without explications, that if the conduct is illegal, it is attributable to the employer. *NLRB v. Pope Maint. Corp.,* 573 F.2d 898 (5th Cir. 1978); *Hendrix Mfg. Co. v. NLRB,* 321 F.2d 100, 104 (5th Cir. 1963); *NLRB v. New England Tank Industries, Inc.,* 302 F.2d 273, 1st Cir., *cert. denied,* 371 U.S. 875, 83 S.Ct. 147, 9 L.Ed.2d 114 (1962). *NLRB v. Milco, Inc.,* 388 F.2d 133, 137 (2d Cir. 1968). *See also, NLRB v. Neuhoff Bros. Packers, Inc.,* 375 F.2d 372, 374 (5th Cir. 1967).

presumptively liable for their words and deeds. To dispel this presumption, various means are available. For example, a company's sufficient repudiation of supervisory misconduct may absolve it of liability for unfair labor practices. E. g., *Imco Container Co. v. NLRB*, 346 F.2d 178, 181 (4th Cir. 1965). In the case before us, though, Big Three does not say that it repudiated the anti-union warfare waged by its supervisors.[6] Rather, the Company relies on a second basis for overcoming its presumed liability; Big Three disavows the alleged misconduct claiming that such acts were isolated, casual, innocuous and committed by low-level supervisors.

A recent case forgiving an employer for interference by low ranking supervisors is our decision in *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245 (5th Cir. 1978). In that case, we found no § 8(a)(1) liability because:

> . . . these statements were made by low-echelon foremen and supervisors who were friends of the employees and knew them on a first-name basis, . . . the statements were made at the work stations or during work breaks in friendly conversations, and that the statements were isolated and innocuous and were not threats or promises of the Company.

6. If anything, conduct by high ranking Big Three officers tended to corroborate an impression of Company-wide antipathy to the Union. In the middle of the campaign, the plant manager held a meeting to promise greater responsiveness from management, apparently to minimize any perceived needs for a union. Additionally, the Company's unfair labor practices at other facilities were familiar to workers at the Bayport plant. *E. g., NLRB v. Big Three Industries, Inc.*, 497 F.2d 43 (5th Cir. 1974); *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966). This background and, later, the discriminatory suspension of Fairless and Coryell enhanced appearances that the supervisors represented their employer in the anti-union campaign.

Id. at 1257. *See also NLRB v. M&W Marine Ways, Inc.*, 411 F.2d 1070 (5th Cir. 1969) (action of supervisor in casual conversation does not necessarily violate § 8(a)(1)). *Pioneer Drilling Co. v. NLRB*, 391 F.2d 961, 964 (10th Cir. 1968). The exemption from liability conferred by these decisions can be explained on two grounds. First, a few casual words may lack the sufficient force to dampen unionist energies. *E. g., NLRB v. M&W Marine Ways, Inc., supra,* at 1073.[7] Second, scattered anti-union remarks that are spoken among friends might appear to be independent conclusions of the supervisors rather than the product of organized Company resistance. In the present case, no one calls harmless such patently coercive themes as plant closing, blacklisting and company spying. Because such activity constituted obvious interference, the Company instead argues that the congenial context dislodged any basis for responsibility. We disagree.

The coercion by Big Three supervisors was not isolated. We do not face a single conversation such as that immunized in *Dierks Forests, Inc. v. NLRB*, 385 F.2d 48, 50 (8th Cir. 1967), or *Pioneer Drilling Co. v. NLRB*, 391 F.2d 961, 964 (10th Cir. 1968). Nor were acts of interference thinly spread among 500 employees during an eighteen month period as occurred in *Federal-*

7. *Compare Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1252, 1256-1258 (5th Cir. 1977) *with NLRB v. Huntsville Mfg. Co.*, 514 F.2d 723, 725 (5th Cir. 1975), and *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 707 (5th Cir. 1975). These cases consider whether statements by supervisors actually tended to be coercive and in assessing the effect of employee interrogations, the company rank of the speaker as well as the setting of the discussion are relevant criteria. *E. g., Mueller Brass Co. v. NLRB*, 544 F.2d 815, 821 (5th Cir. 1977). These cases have no direct bearing, though, on the related but different question of employer responsibility.

Mogul Corp. v. NLRB, supra. In the present case, we confront some fifteen separate items of coercion directed at 35 workers and concentrated within the two months of the union drive.

Further, there is no showing that these inhibitive exchanges transpired in casual settings that obviated the usual work place relationships. Respondent has not asserted that anti-union remarks issued between old friends at a bar, the situation in *Dierks Forests, Inc., supra,* or that the speaker expressly disclaimed any authorization by the Company as in *Schwob Mfg. Co. v. NLRB,* 297 F.2d 864, 869 (5th Cir. 1962). Also missing is the express finding of long standing friendship between speaker and listener, a salient feature of *Federal-Mogul Corp v. NLRB, supra,* and *NLRB v. M&W Marine Ways, Inc.* Here, only one incident, a conversation between Supervisor Lindsay and employee Trojanowski, involved good friends. The friendliness of two other supervisors, Park and Richardson, is subject to serious factual dispute.[8] Further, we emphasize that social relationships in themselves are not a sufficient basis to lift acts of illegal interference from the scope of the Company's responsibility. Friends can unlawfully threaten their friends. Indeed, warnings of Company retaliation cast as friendly advice from a familiar associate might

8. Park's professed union sympathies were characterized as "corporate b_____ sh_____" by one worker. The Company contends that Richardson did not act in its behalf because he reported anti-union measures to union supporters. We observe that these reports, irrespective of Richardson's loyalties, carried a message of Company retaliation against union adherents, a message inimical to § 8(a)(1). Moreover, Richardson's role in the discriminatory suspension of two pro-union workers convincingly belies the claim that he served the Union.

be more credible, hence, more offensive to § 8(a)(1) than generalized utterances by distant Company officials. To escape liability, Big Three must establish that the specific contexts of union-chilling remarks negated the Company's presumed authorization. Such a burden has not been met. Several coercive encounters occurred behind the closed doors of a company office. With other alleged interference, the record does not indicate the setting, but we emphasize that the Company bears the burden of showing that particular supervisory acts occurred in social rather than business environments.[9]

The one criterion weighing against imputed liability is the low Company rank of Lindsay, Richardson and the rest. This alone, however, cannot absolve the employer. In *NLRB v. Kaiser Agr. Chem. Div. of Kaiser A&C Corp.,* 473 F.2d 374, 384 (5th Cir. 1973), we said: "The company asserts, however, that the unfair labor practices were not serious since they were committed only by 'lower-level supervisors.' The law is to the contrary. An employer is responsible for the acts of its supervisors." Any other conclusion would encourage companies to channel coercion through the lower levels of management.

We conclude that the words and acts of Big Three's supervisors intruded unacceptably upon prerogatives safeguarded by the National Labor Relations Act. The employer failed to repudiate its supervisors at the time they

9. The ALJ did not separately examine the context of each item of supervisory interference to ascertain whether the employer's authorization had attached. In his written opinion, he equated "agent" with "supervisor." Big Three Industrial Gas & Equipment Co., case 23-CA-6190 at 4-5 (1977). Lacking some showing that these supervisors did not represent their employer, it was enough that the guilty persons were determined to fall within § 2(11).

interfered with protected rights; the disavowal attempted in this appeal comes too late. Holding that Big Three is responsible for these unfair labor practices, we enforce the appropriate portion of the Board's order and decision.

Section 8(a)(3): The Suspension of Fairless and Coryell

Section 8(a)(3) of the Act prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. *American Ship Building Co. v. NLRB,* 380 U.S. 300, 311, 85 S.Ct. 955, 13 L.Ed.2d 855, 863 (1965). The Board found that Big Three committed such unlawful discrimination by the three-day suspension of union supporters Fairless and Coryell. With this determination, the Board reversed the Administrative Law Judge who had concluded that the suspensions were not a consequence of discriminatory intentions, but resulted from the enforcement of a valid Company rule.

[8] Both workers admittedly disobeyed a Company directive by leaving the premises without punching their time clocks or notifying a supervisor. We emphasize, though, that an otherwise valid rule may not be discriminatorily applied to penalize those who assert rights protected under the Labor Act. When selective enforcement is propelled by union animus, the strictures of § 8(a)(3) are contravened. *See e.g., NLRB v. Heck's, Inc.,* 386 F.2d 317, 320 (4th Cir. 1967). In the case before us, a claim of discriminatory selective enforcement arises because the employer suspended only the union supporters, Fairless and Coryell, while a third rule breaker, Judd, who had not signed a card, suffered just a mild reprimand.

To establish that this disparate treatment was unlawful, it must be shown that the employer's conduct was inspired by anti-union motivation, which is the primary determinant of § 8(a)(3) violations. *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). The Administrative Law Judge found no intentional discrimination because Superintendent Borey, who ordered the suspension of Fairless and Coryell, was unaware of Judd's transgression. Since Borey applied the same sanction to the only rule violators known to him, he was innocent of conscious discrimination.

While the Board did not dispute factual findings by the Administrative Law Judge, it reached a contrary result through a different legal analysis of the suspensions. Accepting that Superintendent Borey was unaware of Judd's rule-breaking, the Board focused on the action by a Company operative who did know that all three workers had broken the Company rule. Supervisor Richardson had observed Fairless, Coryell and Judd leaving the plant without punching out. Yet Richardson reported only the two union supporters for disciplinary action. This intentional disparate treatment was held by the Board to constitute an unfair labor practice.

[9-11] In assessing conflicts between the Administrative Law Judge and the Board as to conclusions rather than specific factual findings, we must defer to the Board if their determination is supported by substantial evidence. *NLRB v. W. R. Grace & Co., Const. Products,* 571 F.2d 279, 282 (5th Cir. 1978); *Russell-Newman Mfg. Co. v. NLRB,* 407 F.2d 247, 249 (5th Cir. 1969). In the present case, we find ample warrant for the Board's conclusion. The proscription of § 8(a)(3) encompasses more than ultimate punitive decisions inflicted upon union advocates. Intermediate conduct that is causally connected to eventual anti-union action will affront § 8(a)(3) if

impelled by union animus. *Cf. NLRB v. O. A. Fuller Super Mkts., Inc.*, 374 F.2d 197, 200 (5th Cir. 1967). Here, Richardson's report formed the basis for the suspensions and thus unquestionably contributed to the punishment of union adherents. Equally clear is the anti-union motive behind Richardson's action. Illegal purpose may be inferred from the fact that, although three workers disobeyed the rule, Richardson reported only the union supporters. *Cf. NLRB v. Great Atlantic & Pacific Tea Co.*, 409 F.2d 296, 298 (5th Cir. 1969). Further compelling evidence is found in Richardson's statement to Judd not to worry because the Company was not after him.

We find substantial evidence that the Company violated § 8(a)(3) when Richardson, its supervisor, insured that only union adherents would be punished for their rule-breaking. The Board's order and remedy for the unlawful suspension of Fairless and Coryell is enforced.

Section 8(a)(3): The Discharge of Every Maintenance Worker

[12] The most serious violation of the Act found by the Board was the allegedly discriminatory discharge of all thirty-four workers in the maintenance department. The Company defended this termination as a necessary response to a rash of problems erupting in the maintenance unit during July and August. The Board rejected the Company's asserted justification as a deception painted over actions more accurately characterized as the retaliatory firing of union supporters. While we find some truth in the claims of both parties, considerations of policy and law compel affirmance of the Board.

This court has recently decided a case in which the jobs of an entire workforce were weighed against a myriad of destructive acts directed at an employer. In *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), the court condoned the wholesale disemployment of a 107-man workforce by an employer wracked with weeks of extensive sabotage and spiralling financial losses. In the present case, respondents seek an extension of *Johns-Manville* to immunize the Company's jettisoning of some thirty-four employees in the problem-plagued maintenance department. The Board argues that our decision of *Johns-Manville* is unprecedented and urges that we confine the case to its particular factual setting.

Our starting point is the recognition that Big Three's purported justification for the allegedly discriminatory decision to subcontract differs qualitatively from the usual business explanations proffered in such cases. Here, the unit replacement is not an asserted consequence of changed business conditions, subcontracting economics or other forces of universal application to each worker. *E.g., NLRB v. Gopher Aviation, Inc.*, 402 F.2d 176, 183 (8th Cir. 1968). In the present case, Big Three's drastic responce was to misconduct by a few workers within the maintenance unit—a condition that was neither inevitable nor incapable of differentiated response. Courts have long been loathe to countenance an infliction of punishment upon many for the misdeeds of a few. "Certainly all the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights." *Stewart Die Casting Corp. v. NLRB*, 114 F.2d 849, 856 (7th Cir. 1940). "The violence of these two employees . . . is not, however, to be imputed to [the] other union members in the absence of proof that iden-

tifies others as participating in such violence." *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 268 (6th Cir. 1945).[10] The exception created in *Johns-Manville* arose from extreme circumstances—circumstances threatening the economic survival of the plant and effectively denying its use to the employer. At least three factors distinguish *Johns-Manville* from the present case: the severity of misconduct, the complete absence of anti-union animus, and the employer's exploration of alternatives to permanent replacement of the workforce. Finding these features inapposite to the present case, we refuse to extend *Johns-Manville* to exempt Big Three's mass discharge of 34 maintenance workers.

A necessary predicate to the *Johns-Manville* holding was the determination that, as a matter of law, an in-plant strike had occurred. Because the personnel were deemed strikers, the discharge and permanent replacement of the entire workforce was held to be sanctioned under *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938).[11] Thus the *Johns-*

10. *See also NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978) (fact that some of 31 strikers were guilty of misconduct did not justify the company's refusal to rehire any of the 31); *American International Aluminum Corp.*, 149 NLRB 1205 (1964) (Board proscribed termination of entire production crew due to slowdown by unspecified persons; employer's motivation deemed suspect). Even an employer's honest, but mistaken, belief that certain union adherents were planning acts of sabotage did not excuse the discharges of these men. *NLRB v. Burnup & Sims*, 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed.2d 1 (1974). *See also* 29 U.S.C. § 106 (1970).

11. *MacKay* held that economic strikers—workers engaged in protected activity and free from any wrongdoing—could be replaced so that an employer could continue to run his business. In a related fashion, *Johns-Manville* authorized the replacement of workers, including those innocent of wrongdoing, where no realistic alternative would permit company operations to continue. Thus, the "in-plant

Manville methodology requires a preliminary determination whether misconduct reach dimensions of severity to become functionally equivalent to a strike. While some wrongdoing occurred in the present case, such activity fell far short of the weeks of sabotage inflicted in *Johns-Manville*. In that case, the employer was repeatedly forced to halt the production resulting in large losses to the company. By contrast, Big Three did not suffer even a fleeting interruption in its manufacturing processes and the main financial loss stressed by the respondent in the record is the $4,000-$5,000 repair bill for two damaged machines.[12] Additionally, in *Johns-Manville*, the court

strike" characterization, as used in *Johns-Manville*, evidently connotes a level of misconduct so outrageous as to significantly impair continued operations by the employer. Because the misconduct in that case was continuing without an end in sight, *Johns-Manville* can be distinguished from the cases cited by Judge Wisdom involving employer sanctions after the fact of specific items of employee misconduct. Clearly, an employer punishing past wrongs must separate the guilty from the innocent. Arguably an employer faced with an unstoppable flood of misconduct may be unable to make a differentiation. One Student commentator agrees with Judge Wisdom. *See* Recent Decision, 12 *Ga. L. Rev.* 131 (1977). As of this writing, a petition for certiorari in the *Johns-Manville* case is still pending before the Supreme Court. *See Oil, Chemical & Atomic Workers v. Johns-Manville Products Corp.*, 557 F.2d 1126 (5th Cir. 1977), *petition filed*, No. 77-1351, 46 U.S.L.W. 3699 (March 24, 1978). Because that case is fundamentally different from the one now before us, we need not await the final disposition of *Johns-Manville*. Here, the circumstances correspond to an after-the-fact punishment, rather than a last resort effort to stem an unceasing tide of sabotage.

12. At the Johns-Manville facility, the company manufactured organic felt. Breaks in the sheets could be accomplished by striking a water mixture or finished sheet with one's finger or some utensil. These paper breaks could be "carried out surreptitiously, making it difficult if not impossible to observe the guilty individual or individuals." 557 F.2d at 1128. This activity, which commenced around August 22, 1973 reaching a crescendo on October 22, was compounded by deliberate destruction of machinery and an intentional disconnection of an electrical switch causing a complete shutdown of the mill.

confronted more widespread acts of destruction conducted over a much longer period of time. This arguably suggests involvement or at least tacit approval, of more than a couple of workers. In the present case, telephone threats and related conduct were almost exclusively confined within a thirty-six hour period and were evidently the work of a few individuals.[13] We are reluctant to derive a strike by an entire department from conduct that may have represented only one or two embittered workers. Finally, in assessing whether particular misconduct was sufficient to impose the status of a striker upon every worker, we note that in *Johns-Manville* life and limb were actually jeopardized at least once as scrap metal was jammed into a machine. If undetected, this action would have caused a serious explosion. In the present case, no actual prospect of harm ever arose at the Big Three job site. While Big Three endured serious mischief, the misconduct did not effectively deny the employer the benefit of his workers' energies, which is the essence of striking.

A second crucial feature of *Johns-Manville* is the complete absence of anti-union motivation in that case. Anti-union purpose is the principle determinant of § 8(a)(3) violations. *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). While no basis existed for suggesting actual discriminatory intentions

In the present case, the principal damage actually inflicted was to two machines. As the Board points out, the Company's report on maintenance department misconduct did not include any mention of such damage.

13. We further note that there is no reason to believe that the identities of the actual culprits were known to the other workers. The placement of phone calls, the nighttime firing of gunshots and other misdeeds were not committed in the midst of fellow employees during work hours.

behind the terminations in *Johns-Manville,*[14] the present case is fraught with statements and actions providing substantial evidence for the Board's finding that antipathy toward unionism spawned the maintenance unit dismissal. One circumstance suggesting discriminatory intentions is the fact that the subcontracting decision followed right on the heels of the sharp skirmishes in the union drive. *NLRB v. National Food Stores, Inc.,* 332 F.2d 249, 252 (7th Cir. 1964). Another factor indicating improper motive for the mass discharge is the presence of other unfair labor practices during the period leading up to the unit termination. *NLRB v. Big Three Industries, Inc.,* 497 F.2d 43, 49-51 (5th Cir. 1974). Specifically, the § 8(a)(1) violations found in statements by supervisors and the § 8(a)(3) discrimination underlying the suspension of Fairless and Coryell support the conclusion that anti-union spite prevailed in the decision to replace the maintenance workforce. Moreover, we would be less suspicious of the Company's real purpose had it not reached the subcontracting decision so hastily but instead had explored means for curing its problems that did not jettison its workers. In sum, these indicia of purpose provide abundant support for the finding that anti-union animus pervaded the Company's action.

However, even though we endorse the Board's finding of anti-union animus, we do not entirely discount the

14. The Board found that § 8(a)(3) was violated notwithstanding the absence of evidence of actual discriminatory intent. Relying upon the rule of *per se* discrimination enunciated in *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), the Board concluded that the mass discharge of the Johns-Manville workforce was "inherently destructive" of "important employee rights" thereby eliminating the need to show actual anti-union motivation. Johns-Manville Products Corp., 223 NLRB 1317, 1332 (1976).

Company's assertions that honest buisness purposes contributed to its decision to subcontract. The Board did not specifically discredit the words of company officials who attested to the legitimacy of their business justification. Furthermore, we do not doubt that a company with a trouble-ridden workforce would want to eliminate further inconvenience and expense by eliminating the workforce. *Cf. NLRB v. R. C. Mahon,* 269 F.2d 44, 47 (6th Cir. 1959) (added costs of unionism a legitimate consideration). This seems especially plausible because the company had subcontracted its maintenance work in the past and only since 1975 had the Company directly employed people for the job.

Accepting the Board's finding of anti-union motivation, and yet assuming the existence of some legitimate business purpose, we are found with a decision activated by two goals: one legitimate, and one that we must condemn. In this circuit, the threshold for illegality is crossed if the force of invidious purpose is "reasonably equal" to the lawful motive prompting conduct. *Cramco, Inc. v. NLRB,* 399 F.2d 1, 6 (5th Cir. 1968).[15] While we can-

15. *See also NLRB v. Longhorn Transfer Service, Inc.,* 346 F.2d 1003, 1006 (5th Cir. 1965); *NLRB v. Hudson Pulp & Paper Co.,* 273 F.2d 660, 666 (5th Cir. 1960). In fact, the threshold for illegal motive may not require a "reasonable equality," but may, according to some cases, be met if invidious purpose is part of the decision at issue. *NLRB v. O. A. Fuller Super Mkts., Inc.,* 374 F.2d 197, 200 (5th Cir. 1967); *NLRB v. American Mfg. Co. of Texas,* 351 F.2d 74, 79 (5th Cir. 1965). This less exacting standard represents the prevailing view among other circuits. *Jeanette Corp. v. NLRB,* 532 F.2d 916, 920, n. 5 (3d Cir. 1976); *NLRB v. Elias Bros. Restaurants, Inc.,* 496 F.2d 1165, 1167 (6th Cir. 1974); *NLRB v. Central Press of Cal.,* 527 F.2d 1156 (9th Cir. 1975). The most exacting test is the preponderant motive or "but for" standard of the First Circuit. *Stone & Webster Engineering Corp. v. NLRB,* 536 F.2d 461, 464-465 (1st Cir. 1976). While Judge Thornberry has ably refuted any contention that such a strict test operates in this circuit, *Federal-Mogul Corp. v. NLRB,* 566 F.2d 1245, 1263-1265 (Thornberry, J., specially concurring), even a "but for" test would be met in the instant case.

not fix precise percentages for the motivational ingredients of Big Three's action, we do say that the employer has failed to establish that business justification was dominant. The Board dismissed Big Three's purported justification as a sham; we find this justification subsidiary to the force of union animus in triggering the mass discharge. Accordingly, the motivational predicate for § 8(a)(3) violations is established.[16]

In addition to the severity of misconduct, and the purpose behind resulting discharges, a third factor compellingly distends this case from the reach of *Johns-Manville.* The employer in that case exhausted various alternatives before resorting to the unusual and severe solution of unit-wide job termination. In *Johns-Manville,* the employer endured weeks of destruction, gradually accelerating its responses to the spiralling destruction. The Company twice consulted with union leaders asking their help in combatting the tide of disruption. When that failed, brief lay-offs were effected in the hope of deterring future sabotage. Next, the Company tried to operate with temporary replacements of its trouble-ridden workforce. None of these measures, however, impeded the flow of the vandalism. Then, after weeks of harm created unacceptable job place tensions, and monthly losses to the Company averaging $300,000, the em-

16. The Company insists that, at the time of the mass discharge, the union campaign had already failed and become a "dead issue." This claim was rejected as the ALJ specifically determined that organizational efforts continued up to the time of the decision to subcontract.

ployees' jobs were terminated. This exhaustion of alternatives contrasts profoundly with the action of the Big Three employer. Here, an employer faced with much less onerous mischief, reacted almost reflexively and without considering the jobs and livelihood of its workers. Just five days after the series of threatening phone calls, the Company responded to its problem with the solution most injurious to its employees and their rights under the Labor Act. So swift and harsh a reaction is not acceptable. It tainted the employer's intentions; further, it cast honest workers into unemployment along with the few miscreants even though such an unfairness might have been avoided.

[13, 14] We do not say that a company plagued with overwhelming troubles from a work unit must invariably endure industrial turmoil until any particular level of harm has accumulated for a court to permit termination of the workforce. But we do say that in this case the Board's conclusion that matters had not reached such a pass is supported by substantial evidence. The Diaconian measure of unit-wide job information is not to be lightly countenanced. The stake of workers in their company is a substantial one. Their employment represents a means of paying bills and supporting their families. It may also reflect the years of hard work and pride invested to better the company and enhance their own job security. This interest of workers is obliterated by job termination. When an entire unit is discarded, the impact on these men and women, and all who would support unions, is profound. "No conduct more drastic, or more likely to have lingering, ineradicable effects can be imagined." *NLRB v. Townhouse T. V. & Appliances,*

Inc., 531 F.2d 826, 830 (7th Cir. 1976).[17] We conclude noting that respondent does not challenge the Board's provisions for remedy—a prescription that includes reinstatement, back pay, and the posting of appropriate notice. Such relief is fully authorized by the Act, *e. g.*, *NLRB v. American Mfg. Co. of Texas, supra,* and clearly demanded by the facts of this case. The decision and order of the Board is hereby

ENFORCED.

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17. The special concurrence suggests that *Johns-Manville* permits some anti-union motivation in a decision to replace a workforce. We note, though, that the Board as well as the majority in that case specifically found that no anti-union animus was present; in fact, the union did not even assert its existence. 557 F.2d at 1133. As the concurrence points out, an employer engulfed with acts of sabotage may evince hostility toward an intractable workforce. Indeed, the employer in *Johns-Manville* evidently expressed such exasperation. 557 F.2d at 1131. Hostility toward particular workers, however, or even a personal dislike of union opratives is not anti-union animus lying at the core of the proscription of § 8(a)(3). This provision addresses antipathy toward the assertion of rights of self-organization, that encourages or discourages union membership. In *Johns-Manville*, there was no indication that the right to unionize and bargain collectively was resented. In fact, the employer's bargaining history reflected otherwise. By contrast, in the present case, the employer fought the very existence of a union resisting and undermining protected rights of self-organization. Such animus creates not only a compelling distinction from *Johns-Manville*, but it raises the fundamental determinant of § 8(a)(3) liability. Indeed, ordinarily, when an employer displaces his workforce by subcontracting, the question of § 8(a)(3) liability turns on the issue of motivation. *Compare NLRB v. George J. Roberts & Sons, Inc.*, 451 F.2d 941 (2d Cir. 1971) (anti-union purpose behind subcontracting) *with NLRB v. Gopher Aviation, Inc.*, 402 F.2d 176 (8th Cir. 1968) (years of financial loss mandated subcontracting). The present case, however, involves the extraordinary claim that a unit-wide job termination is justified due to unprotected acts by a fraction of the workforce.

GEE, Circuit Judge, Specially Concurring:

I concur in the result and in all of the court's opinion save its ascertaining of a "complete absence of anti-union animus" as a factor which distinguishes this from the *Johns-Manville* situation.[1] In the first place I do not think there was such a complete absence in *Johns-Manville;* an employer who gives as some of his reasons for a lock-out "the Union's unreasonable demands, unresponsive attitude and willful acts, as well as [a] history of sabotage" as did *Johns-Manville* (557 F.2d at 1131) seems to me to be rather clearly evidencing *some* animus against the union. In the second, I think it somewhat unrealistic to expect employers under the sort of attack evidenced by the facts of *Johns-Manville* to preserve an entire absence of anti-union animus. If this be made a condition of relief, only saints will receive it.

1. *Johns-Manville Products Corp. v. N. L. R. B.*, 557 F.2d 1126 (5th Cir. 1977).

APPENDIX "E"

JMW

230 NLRB No. 48

D—2585
Pasadena, Tex.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 23—CA—6190

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO.

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL, UNION, AFL-CIO

DECISION AND ORDER

On February 18, 1977, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and General Counsel filed limited exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions

of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We adopt the Administrative Law Judge's finding that Messrs. Park, Alexander, Richardson, Osborn, Reddoch, Lindsay, and Fagan are supervisors within the meaning of Section 2(11) of the Act. In support of that finding, we note that, in addition to the evidence relied on by the Administrative Law Judge, the record shows that the above-named individuals possess the independent authority to terminate and discipline employees, and effectively recommend such actions.

Secondly, we adopt his findings that Supervisors Park, Richardson, Osborn, Lindsay, and Peters violated Section 8(a)(1) by interrogating, threatening, and promising benefits to employees to discourage union activity. We further adopt his finding that, in August 1976, the Respondent terminated 34 employees, its entire maintenance work force, in violation of Section 8(a)(3), in order to dissipate support for the Union. In doing so, however, we disavow the Administrative Law Judge's conjectures in regard to whether union activity was discussed at a management meeting immediately preceding the terminations. These conjectures are without support in the record and are, in any event, completely unnecessary to a finding that the terminations violated Section 8(a)(3).[1]

Finally, we have determined to reverse the Administrative Law Judge's finding that the suspension of employees Fairless and Coryell did not violate Section 8(a)(3) of

1. In fiinding an unlawful motive for the terminations, the Administrative Law Judge inadvertently referred to the "dearth" of evidence in support thereof. We correct this sentence to note the "wealth" of evidence which supports this conclusion.

the Act, as contrary to the preponderance of the uncontroverted evidence. On August 17, 1976, Coryell, Fairless, and another employee, Lee Judd, all left the company grounds to have dinner in violation of an announced company rule. The Administrative Law Judge found that Respondent knew that Coryell and Fairless had signed authorization cards, but that Judd had not; that Supervisor Richardson knew that all three had left the plant that night; and that Richardson was present when Plant Maintenance Superintendent Borey suspended Coryell and Fairless. The Administrative Law Judge, however, found no violation on the grounds that the record did not show that Borey personally knew that Judd had also violated the rule. We conclude, however, that such knowledge by Borey is not necessary for a finding of an 8(a)(3) violation here.

As found by the Administrative Law Judge, Richardson knew that all three had violated the rule. He reported to Borey the misconduct of Coryell and Fairless only, and the following day they were suspended by Borey in his presence. Further, Richardson told Judd on the day of the suspension, as credited by the Administrative Law Judge, "Lee, don't leave the plant any more without punching out. . . . Don't worry about it though, we're not after you." This statement and the preceding events warrant the inference that Richardson effectively recommended Coryell's and Fairless' discipline or played a part therein. It also establishes his wrongful motive in doing so. It is well established that such unlawful motive is attributable to Respondent even if the latter was not aware of the reason for its agent's conduct or even if Respondent, in fact, was merely acting to implement a

lawful policy.[2] Accordingly, we find that Respondent, through Richardson's actions, violated Section 8(a)(3) of the Act when Borey suspended Coryell and Fairless. To that end, we will modify the Administrative Law Judge's recommended Order.

Amended Remedy

As we have found that Coryell and Fairless' 3-day suspensions were undertaken in violation of Section 8(a)(3) of the Act, we shall order that they be reimbursed for those suspensions, with interest to be computed in the usual manner, as set forth in the Remedy section of the Administrative Law Judge's decision dealing with the unlawful terminations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Big Three Industrial Gas & Equipment Co., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as so modified.

1. Substitute the following for paragraph 1(e):

"(e) Discouraging membership in or activities on behalf of, Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization of its employees, by discharging and/or suspending employees because of their activities on behalf thereof or otherwise discriminating in regard

2. *Sears, Roebuck and Co.*, 172 NLRB 2222, fn. 1 (1968).

to the hire or tenure of employment or any terms or conditions of employment of its employees."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Make employees Coryell and Fairless whole for any loss of pay due to their unlawful 3-day suspension, in accordance with the manner set forth in the Remedy section.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 23, 1977

Howard Jenkins, Jr., Member

Betty Southhard Murphy, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and we have been ordered to post this notice.

The Act gives the employees the following rights:

> To engage in self-organization, to form, join, or assist any union
>
> To bargain collectively through representatives of their own choosing
>
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
>
> To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT interrogate you regarding your union activities or sentiments or regarding the union activities or sentiments of your fellow employees.

WE WILL NOT threaten you with reprisals because you chose to engage in union activities.

WE WILL NOT promise benefits or better work-conditions to dissuade you from participating in union activities.

WE WILL NOT create the impression that the union activities of our employees are under surveillance by management.

WE WILL NOT discharge or suspend employees for engaging in union activity on behalf of Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights under Section 7 of the Act.

WE WILL offer T. T. Aldridge, Thomas Allbright, James Bowlin, Jesse D. Burleson, Gary Carrico, John E. Coryell, Richard A. Dickman, James L. Ellis, William Fairless, Alan E. Fowler, Robert M. Fox, Kenneth Gatlin, Tom Hurt, Louren Lamb, Daniel G. Leggett, Jesse Lopez, Richard McBride, Steve McKnight, Robert Molis, Robert Rhoades, Richard Michael Robb, Charles Rodriguez, Talmadge F. Smith, Jeff Stevenson, Ricky Talent, J. K. Trojanowski, Fred Walker, Johnnie M. Williams, Marvin J. Williams, Steve Wylie, Ken Tadlock, Mike Vickery, Lee Judd, and Floyd Williams immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to a substantially equivalent position of employment, without prejudice to their seniority or other rights, and WE WILL make each of these employees whole

for any loss of pay he or she may have suffered by reason of our discrimination against them.

WE WILL make whole employees John E. Coryell and William Fairless for any loss of pay due to their unlawful 3-day suspension.

BIG THREE INDUSTRIAL GAS
& EQUIPMENT CO.
(Employer)

Dated _____

By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002, Telephone 713-527-4722.

JD-115-77
Houston, TX

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 23-CA-6190

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO.

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

Robert S. Breaux, Esq., Counsel for
the General Counsel.

Royston, Rayzor, Cook & Vickery by
Charles R. Vickery, Jr., Esq.,
on behalf of the Respondent.

Robert Wages, Esq., for the
Charging Party.

DECISION

Statement of the Case

DONALD R. HOLLEY, Administrative Law Judge: Upon a charge and an amended charge filed by the above-named Union on August 31 and September 7, 1976, respectively, a complaint was issued on October 4, 1976, alleging that Respondent Big Three Industrial Gas &

Equipment Co., herein called Big Three or the Respondent had engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer denying that it had engaged in the alleged unfair labor practices.

A hearing in this proceeding was held before me in Houston, Texas, on December 8, 9 and 10, 1976.[1] Following the close of the hearing, Respondent and General Counsel filed briefs with the Administrative Law Judge:

On the entire record in the case, the briefs, and from my observations of the witnesses, I make the following:

Findings of Fact

1. Jurisdiction

The complaint alleged and the answer admitted that the Respondent, a Texas corporation, has, at all times material herein, maintained its principal place of business at Houston, Texas, with an office and place of business located at 11400 Bay Area Blvd., Pasadena, Texas, where it engaged in the manufacture of oxygen, acetylene and nitrogen.

1. At the hearing, General Counsel was permitted to amend the complaint as follows: Paragraph 6—H. R. Smith, Chairman of the Board rather than President; Sid Peters, General Manager rather than Maintenance Manager; and change A. J. Fayan to A. J. Fagan. Paragraph 15—strike "discharge" and substitute therefore "terminated." Respondent was thereafter permitted to amend its answer as follows: Paragraph 6—change denial to admission that H. R. Smith, Sid Peters, Tom Beville and Roland Borey are supervisors within the meaning of Section 2(11) of the Act; Paragraphs 19(c) and (d)—strike "company supervisors" and substitute therefore "John Richardson" and; Paragraph 19(f)—strike "leaderman and supervisors" and substitute therefore "maintenance members."

During the past 12 months which is a representative period, it manufactured, sold and shipped products valued in excess of $50,000 from its Pasadena, Texas, facility directly to states of the United States other than the State of Texas.

Upon these admitted facts, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union herein has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The principal issues presented in this case are:

1. Whether Joe Park, Gerald Alexander, John Richardson, Ray Osborn, Lynn Reddoch, Albert Lindsay and A. J. Fagan are supervisors within the meaning of Section 2(11) of the Act.

2. Whether the Respondent engaged in specific violations of Section 8(a)(1) of the Act alleged in the complaint.

3. Whether the Respondent suspended employees William Fairless and John Coryell for 3 days on August 18, 1976 for reasons violative of Section 8(a)(1) and (3) of the Act.[2]

2. General Counsel was permitted to amend the complaint to allege the correct date of suspension at the hearing.

4. Whether the Respondent terminated 34 named employees on August 25, 1976, for discriminatory reasons within the meaning of Section 8(a)(1) and (3) of the Act.

B. *Background*

Big Three operates plants at various points in Texas and elsewhere. The only plant directly involved in this proceeding is the plant located at Pasadena, Texas, which is known as the Bayport plant.

Prior to the end of October or beginning of November 1975, Respondent accomplished the maintenance work at its Bayport plant by utilizing a small utility crew and by subcontracting most of the work to Brown & Root, a large non-union contractor. On occasion, a team of specialists called the SMAT team or group,[3] employed by Respondent and utilized as a traveling trouble shooting force would perform limited work at the plant.

The record reveals various Respondent officials became disenchanted with the state of maintenance at the Bayport plant in late 1975. To remedy the situation, the SMAT group was taken off the road and assigned to Respondent's maintenance department at the Bayport plant. The members of the SMAT group were told that Respondent intended to hire its own maintenance force and phase Brown and Root out at the Bayport plant. Additionally there was indication that once the maintenance situation was under control again at the Bayport plant, the SMAT group would go on the road again.

3. SMAT is the abbreviation of Special Maintenance and Technician Team.

Effectuating its plan, Respondent hired many maintenance employees (i.e. millwrights, pipefitters, welders and helpers) during late fall of 1975 and early 1976.

Thus, by mid-July, 1976, Respondent's maintenance force at the plant was overstaffed to some extent and it sought to reduce it by eliminating some so-called deadwood. Accordingly four employees from Respondent's maintenance crew and two Brown & Root maintenance people were informed they would be laid off on Friday, July 16, 1976.

C. *The Union Campaign*

Respondent's above-mentioned layoff plans triggered a union organization campaign at the Bayport plant. Thus, employees Richard Robb, Thomas Hurt, and several other employees, upon learning a layoff was to occur, went to the office of Respondent's assistant maintenance supervisor, Joe Park, and complained that they had understood that in event of a layoff Brown & Root maintenance personnel would be removed before Respondent's own personnel. The matter was thereafter adjusted by Respondent as it agreed to refrain from laying off three Respondent employees, but laid off a fourth man who cussed out his supervisor when informed he was to be laid off. After talking to Park, Hurt contacted Mr. L. Q. Black, International Representative of the Union and inquired what the employees should do to organize the Bayport plant. Black indicated the first step would be to acquire the signatures of 51 percent of the employees on union authorization and applications for membership cards. Employee Richard Robb obtained a number of cards from the Union on July 14, 1976. Robb and Hurt there-

after distributed the cards among Respondent's maintenance employees, utility employees, and operations or production employees. By August 25th, some 38 cards had been signed, most within the maintenance department. Operations employees were reluctant to sign. Respondent's maintenance and utility groups were terminated on the above-mentioned date. At that time, the signatures of 51 percent of the production, maintenance and utility employees had not been obtained.

D. *The Supervisory Issue*

The complaint alleges that 11 named individuals were, at all times material herein, agents of Respondent and supervisors within the meaning of Section 2(11) of the Act. Respondent admits that H. K. Smith Chairman of the Board, Sid Peters—General Manager, Tom Beville —Plant Manager and Roland Borey—Plant Maintenance Superintendent, are agents and supervisors as alleged, but denied the allegation as to the following. Joe Park —Assistant Maintenance Superintendent, Gerald Alexander—Personnel Director, John Richardson—Maintenance Supervisor, Ray Osborn—Maintenance Supervisor, Lynn Reddoch—Maintenance Supervisor, Albert Lindsay —Maintenance Supervisor, and A. J. Fagan—Maintenance Supervisor.

The record reveals that with exception of Park and Alexander, the persons whose status is disputed are persons whom the employees regard as their immediate supervisors. These individuals, Richardson, Osborn, Reddoch, Lindsay and Fagan all wear white hats worn by other management personnel, and with exception of Fagan, who is paid an hourly rate, are salaried employees.

During the times material herein, each of the line supervisors had office space in or conducted business in a separate building located at the front of the plant which was called the White House and they were designated as supervisors in Respondent correspondence. The record clearly reveals that the line supervisors, as well as Park, had an exercised authority to: interview applicants for employment; direct their subordinates in the performance of their work tasks; change employees from one work task to another in situations wherein supervision was also changed; grant requests for time off; determine who worked overtime and how long they would work, and; recommend that employees receive wage increases. Alexander Respondent's Personnel Manager, is in charge of training and personnel at th Baypoert plant, and is supervised by Gerald Dowman, Respondent's corporate Director of Personnel. Park, the assistant maintenance superintendent, supervised the line supervisors. I conclude that Respondent's contention that the above-named individuals are not agents of Respondent to be spurious as they each possess multiple indicia of supervisory authority. Accordingly, I find that Park, Alexander, Richardson, Osborn, Reddoch, Lindsay and Fagan were, and have been at all times material herein, agents of Respondent and supervisors within the meaning of Section 2(11) of the Act.

E. *The Alleged 8(a)(1) Conduct*

General Counsel called some six (6) witnesses to prove the independent allegations of Section 8(a)(1) of the Act alleged in paragraphs 7, 8, 9 and 10 of the complaint. These witnesses attributed certain acts and conduct to supervisors Park, Richardson, Osborn, Lindsay and Peters.

Respondent failed to cause any of the named supervisors to testify although the record reveals that they were still in the employ of Respondent or their whereabouts were known. Such inaction virtually eliminates any question of credibility in this case as I conclude the testimony of General Counsel's witnesses was plausible and I infer that had Respondent produced the supervisors as witnesses, their testimony would have been adverse to the interest of Respondent.[4] Discussion of the testimony pertaining to each of the named supervisors is set forth below.[5]

1. By Assistant Maintenance Superintendent Joe Parks

Employee Lee Thomas Judd testified he conversed with Park about July 1 in the latter's office concerning a raise. Judd observed he had been put in for a raise and stated he felt he deserved it. Park replied, "there's no doubt about it. If it was left up to me, I'd bring you up to $7.50. . . . I can't do it right now." Judd then stated, "As far as the Union is concerned" and Park interrupted him to observe "We know, you haven't signed a card." I find that by indicating, in the above described context, that Respondent knew Judd hadn't signed a card. Park's comment suggested that Respondent was maintaining surveillance of the employees' union activities and, accordingly I find the remark constituted a violation of Section 8(a)(1) of the Act.

4. *M.S. Pirolli and Sons, Inc.*, 194 NLRB 241, 246, enfd. ____ F.2d____ (C.A. 1, 1972), cert. den. 409 U.S. 1008, and cases cited therein.

5. All dates are in 1976 unless otherwise indicated.

Thomas Hurt, who was the only employee to actively assist Mike Robb in the solicitation of union authorization cards, testified he had occasion to visit the maintenance supervisor's office on July 23rd. When he walked in, Park said, "Tom, what is all this union bullshit about?" Hurt replied "Well, everyone is talking about the Union" and Park said, "That's not what I'm referring to—who'se passing out the cards?" Hurt answered that he didn't know and Park then asked "Who are the agitators?" Hurt told him he couldn't tell him that. Thereupon Park asked what the problems were, and inquired whether maintenance could block the Union. Hurt replied he felt maintenance could block the Union and Park then informed him if they could they could have anything to satisfy their gripes and bitches. I find Respondent, through the actions of Park, violated Section 8(a)(1) of the Act on July 23rd by interrogating employee Hurt concerning the Union activities of employees and by promising to remedy gripes and bitches if the employees would block the Union.

Employees Richard Michael Robb and Thomas Hurt both gave testimony concerning a conversation which they had with Park in an office at the White House in late July. Robb placed the conversation as having occurred on July 22 and Hurt testified it occurred on Sunday, July 25th. Regardless of the actual date, both employees indicated the conversation took place after they had completed work and that employee Talmadge Smith accompanied them to the office pursuant to Park's previous request that they stop by after work so they could go have a beer. Hurt, corroborated by Robb, testified Park greeted them by saying he was ashamed of them because they didn't tell him they were going

to organize the Union so he could help them—to use this as leverage to get more benefits and better working conditions at the plant. During the conversation, Park asked how much time they had, indicating they wanted to straighten out some things. He concluded stating he had worked with unions before and they had done nothing but take money from the people; he had never seen a union that did anything for the working man. I find that Park clearly sought during the conversation in question to cause Robb and Hurt, who he then knew to be the leaders of the Union campaign, to abandon or slow down their union activities, by, in effect, promising that Respondent would grant better benefits and improve working conditions to avoid unionization. I find that such conduct violated Section 8(a)(1) of the Act as alleged.

2. By Maintenance Supervisor John Richardson

Shortly after Richardson had been introduced to employee Robb and others as their "new mechanical supervisor," the employees freely discussed the Union with him. Employee Hurt explained the relationship as follows:

> "John Richardson had come up there. He was a new man with the company. He was trying to get in good with the men, which like I explained to him, I hated to see a new man come into the company at this time because of the problems we were having."
>
> "Mr. Richardson, we got to talking to him, and he would tell us what was going on in the supervisor's meetings. I mean this was a "big leak" from the White House."

> "He told us that at the last supervisor meeting he had heard that Tom Hurt and Mike Robb would never go anywhere with this company because he had tried to get a union in there, and that he felt that if we needed to get a jump on trying to find another job, this would be the time to do it.
>
> "We went ahead and talked about other things in the union and the problems the company was having."
>
> * * *
>
> "At this particular meeting, he had stated that one of our big leaks was Mr. Bowlin, carrying tales over to the White House."

General Counsel contends that Richardson, by engaging in the above conversation, which is set forth in the witnesses' words, threatened Robb and Hurt by telling them they would never be promoted and they should seek other jobs and intimidated them by giving the impression their union activities were under surveillance. Richardson's motivation remains unknown as he did not testify at the hearing.

Review of case law concerning the speaker's intent or motive when making statements which arguably constitute violations of Section 8(a)(1) reveals that, in circumstances such as are presented here, the test as to whether employer statements are violative of Section 8(a)(1) turns not on the motive for the conduct, as in a discriminatory discharge case under Section 8(a)(3), but on its reasonable effects on the employees. *Impact Die Casting Corp.*, 199 NLRB 268, 271; and *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7). In

agreement with General Counsel, I find Robb and Hurt could have reasonably concluded upon hearing Richardson's comments, that Respondent was going to punish them for engaging in union activities and that Richardson gave them the impression their union activities were under surveillance. Accordingly, I find the comments violated Section 8(a)(1) of the Act.

On August 17th, Richardson spoke with employee Allbright. During the conversation, Allbright observed someone was telling management what was going on in connection with the Union. Richardson thereupon informed Allbright that employee Jim Bowlin was going to the White House and giving all the names of people who had signed cards so the White House knew who had signed and who hadn't. Richardson also informed Allbright that he had attended a supervisors meeting earlier and that Bowlin had been the only employee in attendance. At or near the same time, Allbright told Richardson the employees had been able to sign up all of maintenance, but were having trouble signing up the operators and getting 51 percent of all the employees signed up. Richardson stated the reason the operators wouldn't sign was the Company had offered them a 40 cents raise.[6] I find that Respondent, through the above-described conduct of Richardson, sought to create the impression that the employees union activities were under surveillance and I find that it sought to deter union activities among the operators by indicating they were to receive a 40 cents

6. Allbright claimed he saw a piece of paper indicating operators were to receive $7.90 per hour several days before the conversation. Respondent's witnesses denied the operators received a raise before November. I find the record evidence insufficient to show that operators were actually given a 40 cents per hour raise.

per hour raise. Both actions constitute violation of Section 8(a)(1) as alleged.

On August 20th Richardson and employee Trojanowski discussed the Union and Richardson informed the employee "John, you'll all get fired". . . "you're going to get fired, just as sure as the world goes around". . . "They're going to run everybody out and bring in contract maintenance." I find that Respondent threatened Trojanowski and other employees by the above-described conduct and therefore violated Section 8(a)(1) of the Act. I further find that no evidence was offered at the hearing to prove the allegation set forth in paragraph 8(f) of the complaint and, accordingly, I shall recommend dismissal of the allegation.[7]

Supervisor Richardson had a similar conversation with employee James Ellis around August 23rd. He told this employee that Bowlin was a company snitch and that he ran to the White House with all information he had concerning the Union. Richardson suggested the employees drop him or give him the "silent treatment" if he came around. He went on to say that supervisor Ray Osborn had promised Bowlin a white hat if he would give the office any information he had regarding the Union. I find that Respondent sought, through this conduct by Richardson, to create an impression that the employee's union activities were under surveillance and that such conduct violates Section 8(a)(1) of the Act.

7. Paragraph 8(f) alleged that Richardson "on or about August 20, 1976, threatened an employee by telling him that he had seen Respondent terminate employees once at another location as a result of the Union, and that Respondent could do it again at its Pasadena, Texas, facilities."

3. By Maintenance Supervisor Ray Osborn

Approximately July 15th, Osborn approached employee Trojanowski and asked him how everyone's pulse was beating. The employee replied ". . . not too good, before you know it there's going to be a bunch of people talking union around here." Osborn replied, "Oh, you damn old Pollack, you know good and well everyone's talking union already—it's nothing new." Trojanowski testified that Richardson thereafter told him if the Union talk kept up they were all going to get fired, asking what good a bunch of supervisors would be to Big Three if they didn't have anyone to supervise. I find that Respondent unlawfully interrogated an employee and unlawfully threatened to discharge employees if they continue their union activities through Osborn's remarks, and find that such conduct violated Section 8(a)(1) of the Act.

During the week of July 22, Osborn conversed with employee James Ellis. At that time, Osborn stated if the employees didn't forget about the Union bit, they were going to run off the whole damn bunch, especially if they continued to get operations people to sign cards. Thereafter, Osborn told the witness that the jobs of he and his buddy were secure, but that Respondent intended to get rid of five "bad apples" named to be Mike Robb, Thomas Hurt, Bill Fairless, John Trojanowski and Mike Allbright. I find that Osborn's comments threatened employees in violation of Section 8(a)(1) of the Act.

4. By Maintenance Supervisor Albert Lindsay

Employee John Trojanowski visited supervisor "Chief" Lindsay at his trailer on June 29th. During the conversation between the two, Lindsay commented on the Union

talk that was occurring at the plant and informed Trojanowski that the Union was a good way for all of them to get fired. He referred to a situation at Respondent's Beaumont plant and said, "It happened there, and it will happen here too . . . The old man will just run you all off. He'd close the plant down if he had to before he would go Union." Trojanowski testified he understood the reference to the "old man" to be a reference to H. K. Smith, Respondent's Chairman of the Board. I find that Respondent threatened employees with discharge if they engaged in union activity through the above-described comments and find that such conduct violated Section 8(a)(1) of the Act.

Subsequently, around July 15th Lindsay had a conversation, much like the one set forth above, with employee Thomas Allbright. "Chief" told Allbright he had better leave the Union alone because he had seen it trying to get started in the Beaumont plant and there was a layoff. Lindsay went on to say people would be called in from other plants to run the operations part of it [Bayport plant] and outside contractors would be called in to do the maintenance work. Lindsay concluded saying he had better leave it alone or he'd run off the whole maintenance crew there and do the exact same thing. Allbright testified he understood Lindsay to be predicting what H. K. Smith would do. I find that Respondent unlawfully threatened employees for engaging in union activities through the above remarks and that such conduct violated Section 8(a)(1) of the Act.

5. By General Manager Sid Peters

Some 2 weeks after the employee union activity began in earnest, General Manager Peters decided to see what

he could do about ascertaining and curing the matters which were bothering employees. Thus, on July 26th, he held a meeting in the conference room at the White House, where some 20 employees were summoned and remained for about 4 hours.[8] Peters indicated to the employees that he wanted to bring them back together; that he felt they had some problems they needed to work out. Thereafter the gripes and complaints of the employees were solicited and the noteworthy ones were put by Peters on a blackboard. Matters mentioned included a new shop, a decent lunch area, and hospitalization insurance. At the conclusion of the meeting, Peters indicated he would take some of the complaints up with Respondent's corporate headquarters and would report feedback to the employees.

On August 2nd, employees Robb and Hurt sought out Peters. Hurt had laid the groundwork for the ensuing conversation several days earlier by telling Peters his meetings with the employees had not been well received; that they wanted quick action and felt they were being messed around by the Company. Hurt testified that he and Robb approached Peters on August 2nd because they had been unable to get 51 percent of the employees to sign union cards and they wanted to get Peters to agree to an interim measure which would permit them to continue to organize. Hurt asked Peters what he thought of a company union at the outset of the conversation and Peters indicated he didn't think a company union would work. Hurt then suggested a committee and Peters' reaction was that probably wouldn't work either but if a

8. Other meetings were held, with about the same number of employees attending and those meetings were conducted in much the same manner as the meeting under discussion.

committee was used it would have to be small. When it appeared Peters was not going to make any definite commitment, Robb told him "Sid, you know we hold the cards?" Peters then asked the employees if they could cool things down in the field and get them to back off the Union. Hurt and Robb indicated they could do as Peters suggested.[9]

The complaint alleges, and I find, that Respondent violated 8(a)(1) of the Act by attempting to cause employees Hurt and Robb to "cool down" the Union activity of employees until Peters and Respondent could eliminate the source of some of their discontent. I further find that Peters' conduct of meetings with employees, under the circumstances, including his request that Hurt and Robb "cool down" the Union activity, was violative of Section 8(a)(1) of the Act, as Peters was obviously promising employees additional benefits and improved working conditions to cause them to cease their union activity.[10]

F. The Suspensions of William Fairless and John Coryell

William Fairless and John Coryell were suspended for three (3) days without pay on August 18th. Respondent contends it suspended these employees because they know-

9. Robb placed the conversation as having occurred on July 30th and testified Peters rather than Hurt suggested a committee. Hurt's recollection was much better than Robb's and Hurt impressed me more while on the witness stand. I credit Hurt's version.

10. In brief General Counsel urges such a finding although the violation was not alleged in the complaint. The issue was fully litigated without objection at the hearing and does not materially vary from the complaint allegations. Accordingly, I conclude such a finding is clearly appropriate. *California Bake-N-Serve, Ltd.*, 227 NLRB No. 78, and cases cited therein.

ingly violated a company rule by leaving the plant for dinner without clocking out. General Counsel asserts the action was motivated, in part, by the Union activities of the employees. I find no violation in connection with these suspensions for the reasons set forth below.

John Coryell was hired by Respondent as a millwright at $7.20 per hour on March 23, 1976. Osborn was his supervisor. William Fairless was hired approximately three (3) weeks later, on April 12th. He was also hired as a millwright at $7.20 per hour. Fairless was originally supervised by "Chief" Lindsay, and later by Osborn. Although there was considerable overtime work at the plant for maintenance employees during the entire period of their employment, neither of these employees liked overtime work. Due to the fact that they frequently refused to work overtime, Roland Borey, the plant maintenance superintendent, suggested in June or early July that each of them find another job where they would only be required to work 40 hours per week.

Coryell and Fairless both signed union authorization cards on July 15th. They engaged in no other union activity. Neither was particularly friendly with other employees because the employees were unfriendly towards them as they refused to perform what others felt was their fair share of the overtime work.

In addition to the fact that they refused to work overtime when possible, Coryell and Fairless ate their lunch off company property each day.

Maintenance Superintendent Borey testified he had been informed in March that many of the maintenance employees were leaving the plant for lunch without clocking out (and back in on returning), and that they

were taking longer than the time allowed for lunch. Accordingly, he caused a notice to be posted at the timeclock on March 22nd providing:

> At any time an hourly employee leaves the plant, he or she must punch out, and punch back in upon returning. This includes (1) during his regular shift, (2) on overtime for personal reasons, or (3) during lunchbreaks. This is necessary for the safety procedures of this plant and the employees. Thank you for your cooperation.

The record reveals that Coryell and Fairless as well as other employees clocked in and out at lunchtime as directed for a short time after the notice was posted. Thereafter the more skilled craftsmen ignored the notice, leaving for meals without punching out or in, while their helpers normally clocked out and in.

On August 17th the employees in the maintenance department including Coryell and Fairless, were required to work overtime. It is undisputed that assistant maintenance superintendent informed them during the afternoon that no one was to leave the plant that evening; that they were to eat on the premises.

However, at approximately 6 p.m., Coryell and Fairless, who testified they did not like the TV dinners served by Respondent to employees working overtime, left the plant without clocking out and returned from their dinner at approximately 6:40 p.m. Supervisor Richardson observed them leave and upon their return they were summoned to Park's office where they were informed they had been signed out at 6 a.m. — to return at 8 a.m. the following morning.

The same evening, Lee Thomas Judd, another maintenance employee, left the plant for approximately 25 minutes to eat at his home. He did not punch out or punch in upon his return. He credibly testified that no supervisor mentioned the situation to him that night, but Richardson came to him the following day, and said "Lee, don't leave the plant any more without punching out. . . . Don't worry about it though, we're not after you." Judd had not signed a union card and, as indicated hereinabove, Assistant Maintenance Superintendent Park, and presumably Richardson was aware of this.

On the morning of August 18th; Coryell and Fairless reported to the maintenance office at 8 a.m. Alexander, the Personnel Manager, Richardson and Borey were in the office. Borey informed the employees they had violated a company rule by failing to clock out when leaving the plant the evening before and asked if the employees knew this. They indicated they did and were suspended for 3 days (August 18, 19 and 20) without pay. They were asked to sign completed forms bearing the title Notice of Personnel Record Entry which documented the rule, the infraction, and noted the punishment.[11]

General Counsel's argument that Coryell and Fairless were suspended for discriminatory reasons is persuasive if the doctrine of Respondent Superior is utilized to the fullest extent. The picture which would evolve is that Respondent was aware that Coryell and Fairless had signed union cards; it was aware that two (2) union

11. The forms both indicated the employees had been previously warned. There was a dispute as to whether the warning came orally from a supervisor or via the notice posted at the timeclock. In my view, the dispute need not be resolved as both employees admitted they were aware of the rule.

adherents and one (1) non-union employee violated the clock out-in rule on August 17th, and it punished the Union adherents and refrained from punishing the non-union employee and told him Respondent wasn't after him. The difficulty with this argument is the fact that the record does not reveal that Borey, the man who decided to discipline Coryell and Fairless, knew that Judd had left the plant without clocking out or in on return on the evening in question. Due to the fact that Richardson was close to the employees and kept them informed as to what was going on in the White House, I seriously doubt that he made Borey or Park aware of Judd's actions on August 17. I am not disposed to infer that he did. Thus, I am convinced that the issue presented with regard to the suspensions is whether Respondent can discipline known union adherents when they knowingly violate a company rule. The answer, of course, is that participation in union activity does not insulate an employee from discipline or discharge for misconduct in connection with his work. Considering all the circumstances, I find General Counsel has failed to prove by a preponderance of the evidence that Coryell and Fairless were suspended for discriminatory reasons. Accordingly, I shall recommend dismissal of those allegations of the complaint which refer to their suspensions.

G. *The Alleged Discriminatory Discharge of Thirty-four Employees on August 25.*

On August 25th, Respondent discharged all of the employees in its maintenance department at the Bayport plant. It contends this action was taken solely to remedy

a disruptive situation which then existed at the plant. General Counsel contends the reasons assigned for the discharges are pretextual, and that Respondent was motivated to discharge the employees by their union activities. A summary of the evidence relating to the discharges and the manner in which they were effectuated is set forth below.

A few remarks should be made to explain the setting in which the layoff occurred. Thus, the Union organizational campaign was initially quite successful, particularly in the maintenance department, and, as revealed by the record, at least 33 cards were signed by employees by July 21st.[12] The campaign was impeded severely by Respondent's instantaneous opposition, most of which was unlawful. Consequently, by early August the principal union adherents, Robb and Hurt, who recognized the difficulty they would experience in obtaining majority support of the hourly employees, attempted to get Respondent to agree to a lesser form of representation—a company union or a committee, Respondent, on the other hand, was seeking to stop the campaign by engaging in the unlawful activity described above. With matters at somewhat of a stalemate, acts of violence, threats, and disruption were experienced at the plant and elsewhere.

The first series of incidents involved machinery in the plant. Plant Manager Beville testified a two by four was jammed in a water pump in July or August resulting in repairs which he estimated at a cost of $1,200 or

12. G.C. Exhs. 2-5, 7, 9, 11, 13-38. The latest date on cards admitted in evidence was July 21, 1976. Five (5) cards signed by production employees still employed by Respondent at the time of the hearing were not placed in the record.

$1,300. Next, the internals of a boiler were ripped out in August, with repairs costing $2,000 to $3,000. Thereafter, three (3) parts to a turbine, then disassembled and under repair by the maintenance department, were missing. One part, a thrust ring was never found and machining of a new part cost Respondent several thousand dollars.

On August 19, the incidents experienced became more severe. At approximately 1 a.m. on that date, Supervisor Richardson received an anonymous telephone call during which his life was threatened. Shortly thereafter, three shots were fired at his house and later investigation revealed three 38 caliber bullets in the roof line of his house. Additionally, both of the gas tanks of Richardson's private automobiles were sugared the morning of August 19th. Plant Manager Beville testified the incidents were reported to him after Richardson came to work on the date in question.

At 8:30 p.m. on August 19th the first of a series of bomb threats, which were to cause consternation at the Bayport plant until 6 a.m. August 20th; was received by Respondent. Duwayne Harman, a temporary supervisor at the plant answered the phone and an anonymous caller stated:

> Listen close, motherfucker, and listen close to me. You Beville, and you Durbin, there's a bomb set to go off now. Get your ass out.

Harman reported the threat to his supervisor, Norman Dunnham, who, in turn called Plant Manager Beville. At the time some six (6) of Respondent's maintenance

men, led by Hurt, some Brown and Root maintenance personnel, and the 4 p.m.-12 midnight production employees were working. Pursuant to Respondent's bomb threat procedure,[13] police and fire units were called, and non-production employees, including the maintenance force and transportation employees, were evacuated to the gate area of the plant. The threat was investigated by the Harris County Sheriff's office and search of the plant by plant personnel and the authorities failed to reveal the presence of any explosive device.[14] Respondent's maintenance crew, with exception of Hurt, clocked out and went home at 9:30 or 10 p.m. Hurt remained to assist in the search for a bomb until approximately 11 p.m.[15] At the time of the hearing, the Sheriff's investigation file was still open as the caller remained unknown and no arrest had been made. Maintenance work was interrupted by the bomb threat, but production work was not.

Later in the evening on August 19, Beville's wife received a phone call at their home at approximately 10:30 p.m. Mrs. Beville testified the caller was anonymous and the conversation was as follows:

13. Respondent has a written bomb threat procedure in the record as Respondent Exh. 8. It contains instructions regarding report of threats to police, instructions concerning the manner in which such calls are to be handled, and instructions regarding personnel actions including search methods.

14. The report prepared by the Sheriff's office, which merely documents the occurrence, appears in the record as Respondent's Exh. 2.

15. Beville testified he didn't think Hurt assisted in the search. I credit Hurt because he left an hour after the other maintenance employees and Beville didn't appear to have actual knowledge as to Hurt's activities.

Caller: "Is Mr. Beville there?"

Witness: "Who's calling?"

Caller: "There's a bomb going to go off at 6 o'clock tomorrow morning. Make sure his ass is out there."

Mrs. Beville immediately reported the call to her husband, who was still at the plant. As the plant was then operating pursuant to its bomb threat procedure, this threat simply prolonged the situation that then existed.

The record reveals that at least two (2) additional bomb related calls were received at the Bayport plant during the early morning hours on August 20th. Thus employee Jeff Gerber testified, he received and taped two (2) calls made by an unknown person. The first was as follows:[16]

Caller: "The second one will go off at 3 o'clock sharp."

Gerber: "What was that?"

Caller: "The first one was funny. The second one will go off at 3 o'clock sharp."

Gerber: "3 o'clock sharp?"

Caller: "Right here."

The second call was received about an hour after the first. It was as follows:

16. The record does not clearly reveal the time this call was received. The witness described an alleged call which was received at approximately 12:30 a.m. and Respondent's log reveals the call was received at 2 a.m.

Caller: "Let me speak to A. J. Fagan."

Gerber: "Gerber speaking."

Caller: "You have about ten minutes."

Gerber: "Where is it?"

Gerber reported both calls to his supervisor, and Respondent's bomb alert procedure, which was already in effect, was continued. The record fails to indicate whether the maintenance employees who worked the 12 midnight to 8 a.m. shift were evacuated after Gerber received the above-described calls. Respondent's production employees continued to work.[17]

The final anonymous call during the 24 hour period under discussion was made to Marjorie Borey, Roland Borey's wife at 8 a.m. on August 20th. When she answered the phone at her home on that occasion, an unknown person said calmly and deliberately "tell him to be careful. Be careful." Mrs. Borey reported the call to her husband at the plant immediately.[18]

Beville testified that the bomb threats experienced on August 19th and 20th, caused Respondent to add an additional Burns security guard to each shift immediately. Additionally, Respondent posted a notice at the plant which stated that utterance of bomb threats constituted violation of the Hobbs Act (R. Exh. 10).

17. Although I have no reason to disbelieve the testimony regarding the bomb threat made to Mrs. Beville and the two (2) calls made to Gerber during the morning of August 20th; it should be noted that no evidence was offered to show that Respondent reported these alleged threats to the police pursuant to its bomb threat procedure.

18. A second anonymous call was received at the Borey home on the evening of August 20th. The caller just laughed and hung up.

Employee K. O. Dreymala, a class B operator, testified that upon hearing of the bomb threats received at the plant on August 19th, he felt on August 20th that he should bring to Plant Manager Beville's attention a situation in which he was involved earlier. Thus, on August 20th, Dreymala informed Beville that earlier in the summer he was policing a work permit requiring employees to wear lifelines while replacing fan blades on top of a tower in the plant. Maintenance employee Allbright was in charge of the operation and maintenance employees Dill and Hurt were working with him. None wore lifelines as required and Dreymala told them to correct the situation, and they put the lines on. Feeling the employees might take the lines back off, Dreymala went half way down the tower and then ascended again and hid where he could observe. The employees had removed the life lines so he reported them to his supervisor, who, in turn, contacted their maintenance supervisor. The next day, after the three (3) maintenance employees had been reprimanded for their conduct, Dreymala went to the top of the tower in connection with another hazardous work permit. He informed Beville that on the second occasion Hurt, Allbright, Dill, Randal Bell and Mike Robb surrounded him on top of the tower and told him they had gotten in trouble over the incident the previous day, and while standing on the edge of the tower told him if he had anything further to say about a violation of a permit he had better come to them or else.

The above described events, according to Beville, led him to prepare a memorandum which he delivered to his boss, Glen Wheat, Respondent's Vice-President in charge of plant operations, on August 23rd. Beville testified he

gave the memorandum to Wheat, explained he felt the observations therein indicated the maintenance department personnel were the source of the difficulties recently experienced, and he recommended that the Respondent's maintenance employees be terminated and that maintenance at the Bayport plant be subcontracted to Brown and Root. The memorandum, which was admitted in evidence as Respondent's Exh. 9 is set forth in its entirety, minus pencil notations,

Events prior to 8-19-76 bomb threat directed towards Big Three:

1. Maintenance Supervisor, John Richardson, was threatened by phone at approximately 1 AM.
2. John Richardson's house was shot three times by a .38 caliber slug.
3. John Richardson's personal automobiles (2) were sugared (gas tanks).
4. Maintenance Manager, Roland Borey, was threatened by phone through his wife. 10 AM (watch it)

Possible suspects responsible for above are William Fairless and John Coryell.

Possible reason was these two men were suspended for three days for disciplinary action by Roland Borey and John Richardson. There is no definite proof of this. It is my understanding that John Richardson's incident was handled by the Baytown police.

The next event was the bomb threat to Big Three Bayport plant at approximately 8:45 PM. This call

was received by acting Shift Supervisor, Dwayne Harman. The voice was a deep male voice with no noticeable accent. The message was,

> "Listen to me close, mother fucker, close. You, Durbin, you Beville, there is a time bomb set to go off. Get your ass out now."

At 10:30, my home was called (Tom Beville), at which time my wife answered the phone. A male voice asked for Mr. Beville (pronounced wrong), to which my wife replied, "Who's calling?", again asked for Mr. Beville, at which my wife replied, "He's not available." A voice then said, "Tell him the plant is going to blow up at 6:00 in the morning. Tell him to get his fat ass out there." and then hung up.

As per our safety procedure, I was immediately notified by my Shift Superintendent, Norman Dunnam. Mr. Chuck Curtis, Driver Trainer, immediately executed our bomb threat procedure. The Harris County Sheriffs Department was notified, the Pasadena Fire Department was notified, plant supervision was notified, and evacuation of all unnecessary personnel was made. When sufficient supervision arrived, a three and one-half search was made of the plant. There were no findings. Normal operation was resumed at approximately 12:00 midnight.

A good majority of our plant maintenance at this time felt that it was unsafe for them to continue to work, at which time I consented for them to leave. The majority of plant operators remained as did the majority of the contracted Brown & Root personnel. Big Three plant maintenance, except for Talmadge

Smith, A. J. Feagin, and several Big Three laborers, left. At this time, the remaining plant personnel were informed of the 6 AM bomb threat and were advised we would take the same procedure of the 8:45 PM bomb threat.

At 2:10 AM another bomb threat was received by Jeff Gerber. This bomb threat was recorded and is on tape. Briefly, it stated that a bomb would go off in the plant at 3 AM. At 2:50 AM another call was received and recorded. It said that we had ten more minutes before it would go off. At this time we proceeded with the same procedure used at the 8:45 PM threat. No other bomb threats were received after 2:50 AM.

During the early AM, I played the last two tape recordings of the bomb threats to various plant personnel in an attempt to identify the caller. The following facts became available:

1. Kale Dreymala made possible identification of this voice from certain terminology used in the first taped threat, as the voice of Mike Robb, a maintenance mechanic. He recalled an incident approximately four to five months previous where Mike Robb, Jim Bowlin, Bob Dill, Tom Hurt and Fred Walker failed to comply with a HWP permit. At that time he requested them to comply, which they failed to do and he then reported them to his immediate supervisor. The following night in the same area and approximately same personnel led by Jim Bowlin and Mike Robb surrounded him on top of #1 cooling tower. They told him in effect, anytime he

had any complaints they had better come to them and not to supervision. During this conversation, terminology that Mike Robb used was similar to the terminology of the first tape recording (Right here).

2. Albert Lindsey, when he was requested to listen to the tape, made possible identification of Mike Robb.

3. Joe Park, when he listened to the tape, identified the voice as Jim Bowlin.

4. Mike Robb and Jim Bowlin were on duty until 10 PM on the 19th, at which time they left the plant in a 1967 white pickup, license #GH-9800. Shortly thereafter, they were observed driving back and forth in front of the plant by the Burns guard service. Several of Burns detectives followed the white pickup which finally stopped on Fairmont Parkway. Burns detectives observed from a distance and radioed their dispatcher to notify the Harris County Sheriffs Department. When the Harris County Sheriffs Department arrived, the people were gone. At approximately 6:30 AM this vehicle reappeared in the parking lot, driven by Mike Robb, accompanied by Jim Bowlin. Jim Bowlin went into the plant for approximately ten to fifteen minutes then he returned to the pickup. While Bowlin was out of the pickup Harold Riese, Safety Supervisor, asked Mike Robb if he had driven by the plant several times and he told him that they had driven by the plant. They left around 10:00 PM and had gone to get a few beers to have a

party. He said they were driving someone home and his truck vapor locked and that they had to walk to get another vehicle. I informed him that the Harris County Seriffs (sic) Department were looking for a truck with his license number. Jim Bowlin came out of the plant and got into the truck. They informed Harold Riese they would not stay and search for a bomb last night and that is why they left. (Possibility they could have made the 10:45, 2:10, and 2:50 phone threats.) After the conversation they left the parking lot at a high rate of speed.

Beville, who was operations manager at the Bayport plant for some nine (9) years before he was elevated to plant manager during the first week of August, denied that union activities of employees had anything to do with his recommendation that the maintenance crew be terminated. To bolster this denial, Beville testified he was on vacation from July 8 or 9 to August 2; that he was unaware of any union activities at the plant during August; that none of his supervisors had reported who had signed cards; that he was unaware of who had signed cards; and he specifically did not know before they appeared at the hearing that Coryell and Fairless had signed cards. Glen Wheat, who testified he called the Bayport plant every morning to obtain a status report from his plant manager, did not indicate the extent of his knowledge of union activities at the plant, if any, and failed to mention the Union as being a matter which was discussed at the corporate offices at any time.

Beville testifed he recommended that Respondent's maintenance force be replaced because of the bomb

threats, and the threats of violence experienced by supervision, including John Richardson, Borey and himself. He attributed these acts to persons in the maintenance department because the bomb threats started immediately after two (2) maintenance employees were laid off (Fairless and Coryell); Richardson, who was threatened, had his house shot at, and auto gas tanks sugared was employed in the maintenance department; and other supervisors threatened were from the maintenance department.

After Wheat received Respondent's Exhibit 9, complete with Beville's recommendation that Respondent terminate its maintenance employees, he indicated a meeting with undisclosed persons was held at Respondent's Houston headquarters the morning of August 24th. Thereafter, Wheat contacted Beville and arranged a meeting at the latter's home for that evening. The meeting at Beville's home was attended by Sid Durbin (in charge of operations at Bayport plant), Skip Beuttner (position unknown), Dowman (Respondent's Director of Personnel), Glen Wheat, and Beville. They discussed the matters in Respondent's Exhibit 9 and reportedly sought alternatives to Beville's recommendation that the situation should be cured by terminating Respondent's maintenance force. No alternatives were forthcoming.[19]

The next day, August 25th, Wheat attended a meeting at Respondent's Houston office. Present were H. R. Smith, Chairman of the Board, Bill Borey, Charlie Glasier, Bob

19. Roland Borey, who was in charge of the maintenance department at the Bayport plant was apparently not invited to attend the meeting although his counterpart, Durbin, who was in charge of the production department, was in attendance. The record reveals Borey was available, but fails to reveal why he was not invited to this important meeting which concerned his subordinates.

Moore, Jerry Dowman, Sid Peters, and Beville—by speaker phone. At this corporate meeting, Beville's recommendation was adopted.

Although the decision to terminate the Bayport maintenance crew was made early on August 25th, Respondent did not effectuate the decision until approximately 10:30 p.m. because it wished to announce the decision at a time which would minimize the possibility of sabotage by employees in the maintenance department. Accordingly, commencing at approximately 10:30 on August 24th, Dowman and Bayport plant Personnel Director, Alexander called maintenance employees and read them in the message set forth in Respondent's Exhibit 5 which provide in pertinent part:

TO ALL EMPLOYEES

> Effective midnight, August 25, 1976, Big Three Industries, Inc., is discontinuing all maintenance shifts.
>
> Maintenance will be subcontracted because Big Three has determined this is a safer, more reliable, more efficient and flexible way to accomplish the necessary maintenance.
>
> You will be paid for all hours worked through August 25th, plus 16 hours for Thursday and Friday, August 26th and August 27th, plus 40 hours pay in lieu of notice.
>
> GROUP 1
>
> Arrangements have been made for you to report to the Bayport Guard Building 9 AM—Thursday—Aug. 26 where you will be met and given your pay-

> check for all monies due. You will also be given the opportunity to pick up your personal belongings and tools from the Plant area at that time. You will be expected to turn in your Identification Badge prior to receiving your paycheck.[20]

Both Alexander and Dowman testified that when stating the reasons for termination they did not give any reason except those stated on Respondent's Exhibit 5. If the person they talked to asked questions not answered by that document, they simply answered they did not know.[21]

To demonstrate the validity of its decision that its maintenance employees were responsible for the pre-discharge acts described hereinbefore and that its decision to subcontract the maintenance work was sound, Respondent offered evidence relating to the post-discharge period. Thus, employee Wayne Lamson, a salesman employed in Respondent's sales office which is located outside the fenced area of the plant, testified that on August 26th he answered the phone at the office and an unknown person stated "It's going up in 10 minutes". Lamson asked the caller to repeat and the caller again said "It's going up in 10 minutes." The call was immediately reported to the employee's supervisor and the sales office

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20. Mechanically, Respondent divided the maintenance department into three (3) groups. Group 1 was told to come to the plant for final processing at 9 a.m. Thursday, August 26th; Group 2 was to report at 2 p.m. on August 26th; and Group 3 was to report at 9 a.m. Friday, August 27th.

21. While Alexander indicated that persons who were informed of their termination at the plant were not given the "stock" message, the record indicates nothing beyond the fact that they were terminated when they appeared.

was evacuated for about 15 minutes.[22] Between 1 and 1:30 p.m. on the same day a second call was received at the sales office by employee Allen Jones. On that occasion, the anonymous caller said "It's going up at 2:30." Asked to repeat, he did stating "2:30, 2:30, 2:30." This call was also reported to the employee's supervisor immediately and the building, housing some six sales persons, was evacuated for about half an hour. The call was reported to the sheriff's office, and the official report was placed in evidence as General Counsel Exhibit 46. No explosive device was found on either occasion and no arrests were ever made in connection with the incidents.

Beville testified no bomb threats or other incidents of threat or violence have occurred at the plant or among its personnel since August 26th.

With respect to the success or failure of the switch from its own maintenance personnel (assisted by Brown and Root) to a sub-contract situation wherein Brown and Root accomplished all maintenance at the Bayport plant, the record reveals the normal maintenance force contingent (all inclusive) has been reduced from 73 employees as of August 25th to 50 as of the time of the hearing, while payments to Brown and Root have risen from an average of $50,000 per month to $80,000. Additionally, Beville testified that Respondent kept statistics measuring the utility or reliability of machinery and the report for the months of June, July and August showed reliability of 91.9 percent, while the next report

22. The sheriff's office was called, but no report concerning the incident was placed in evidence.

(for a period when Brown and Root was performing all maintenance) showed a reliability figure of 96.2 percent.[23]

Analysis

Respondent asserted as an affirmative defense in this case that it terminated the employees in its maintenance department on August 25th because they engaged in unprotected activity and/or it had reason to believe they did. In my view, no evidence was offered at the hearing which remotely tended to prove either assertion. In point of fact, the only evidence bearing on the subject was Respondent's Exhibit 9, which was not offered or admitted in evidence to prove who committed the acts of August 19th and 20th, and the testimony of employee Dreymala, which did no more than demonstrate that several employees in the maintenance department voiced dissatisfaction with the way young Dreymala performed his duties. Accordingly, Respondent's assertion that maintenance employees committed the August 19th and 20th acts or it had reason to believe they did remains a bare assertion unsupported by any facts whatsoever.

On the other hand, there is a virtual dearth of evidence in this record which supplies an unlawful motive for the

23. Cross-examination of Beville and Wheat by General Counsel revealed the Bayport plant underwent a "turnaround", defined to be a period of concentrated work on machinery to make it more reliable and productive, in September, 1976. Admittedly, additional maintenance personnel are hired for "turnarounds." Wheat admitted reliability would naturally be a lesser percentage immediately before a "turnaround" than immediately afterward. This fact was borne out by reliability reports placed in evidence by General Counsel which revealed: June, 1976—90.6 percent; July, 1976—90.9 percent; August, 1976—94.3 percent; September, 1976—98.4 percent (turnaround month); October, 1976—96.3 percent and November, 1976—93.9 percent.

mass discharges on August 25th. As indicated above, the employee organizers caused a large majority of the maintenance employees to sign union cards during the month of July. Through extensive interrogation of employees and surveillance of their union activities, Respondent became fully aware of the identity of the leading adherents and learned who had signed cards by late July or early August. It was fully aware of the fact that the Union activity was localized in the maintenance department and that, as of August 25th, the production employees had not wholeheartedly joined the campaign. Contrary to Respondent's contention, the Union organization drive had not harmlessly run its course by August 25th. At the very least, the maintenance employees were then insisting on representation in the form of a company union or an employee committee. Robb and Hurt had put the latter proposition to Peters in early August and they had not, by August 25th, been given a reply. Thus, any lull that existed in the Union campaign had been caused by Respondent and the record reveals it was merely temporary.

Ignoring the above facts, Respondent offered evidence falling into three (3) categories at trial to prove that it lawfully discharged its maintenance force. It offered evidence concerning alleged sabotage of machinery for the dual purpose of casting suspicion on the maintenance employees and justifying its layoff or discharge procedure, i.e. calls to employees at their homes late at night and use of security when they reported to pick up their checks and personal belongings. Secondly, it offered evidence revealing the August 19th and 20th incidents to justify the decision to discharge the maintenance force. Finally it offered evidence of post discharge events and

statistics to prove the wisdom of its decision to terminate the employees in question. Respondent would have me consider this evidence in isolation thus causing me to conclude it had good and valid reasons for discharging its maintenance force on August 25th. Respondent's position is unrealistic and untenable.

The Union situation was unresolved in August and I infer that Respondent's top management remained concerned with the Union activity of the maintenance employees on August 25th. The inevitability of such concern makes the testimony of Beville and Wheat exceedingly suspect. Respondent would have me believe that despite repeated threats to run off the maintenance force because of their union activity, the Union activity of these employees was not a matter of consideration or discussion during meetings which led to the decision to discharge them. I do not accept this assertion. To the contrary, I find that Beville and Wheat carefully avoided any mention of the Union activities of employees in connection with the August 25th terminations to mask the fact that those activities were a motivating reason if not the sole motivating reason, for the termination of the maintenance force.

General Counsel contends that the legal principals set forth in *N.L.R.B. v. Burnip & Sims* (379 U.S. 21, 1964) and *Hyster Company* (195 NLRB 84) are applicable in the instant case. In those cases the issues concerned the legality of discharge of union adherents who the employer reasonably believed had engaged in unprotected activity. That situation is not presented in this case. Instead, the situation here is more closely analogous to the one before the Board in *American International*

Aluminum Corp., 149 NLRB 1205. In the latter case, the employer had reasonable cause to believe that certain employees had instigated and directed slowdowns. Rather than terminate those involved in the unprotected activity, it terminated the entire production crew, and thereafter terminated its contract with their collective bargaining agent. As the motive for the termination of the employees who had engaged in unprotected activity was tainted by the unlawful intention to terminate the contract, the guilty employees as well as the innocent were ordered reinstated. Here, the situation differs only in that Respondent has failed to prove that it had reasonable cause to believe that members of the maintenance crew engaged in unprotected activity. Respondent merely suspected some employees may have engaged in unprotected activity and chose to terminate all of them to end the Union activity and to possibly end the bomb threats and allied behavior.

The pretextual nature of the reasons assigned by Respondent for the mass terminations on August 25th is revealed in part by the fact that it terminated all the maintenance employees rather than just those it suspected in connection with the August 19 and 20th activities. Respondent knew that almost everyone in the maintenance department had signed union cards and it suspected that only a few employees in this department had been involved in the unprotected activity experienced. Beville and Wheat both testified that unspecified alternatives to the mass discharge of all maintenance employees were discussed. One is left to conjecture as to whether termination of suspects only was discussed, and one is left to conjecture as to why all employees in the maintenance department were discharged. In my view, these matters

are left to conjecture because they were discussed by top management and revelation of the discussion would reveal the unlawful motivation which served as a basis for the decision to discharge the entire maintenance crew.

For the reasons stated, I find that Respondent was motivated to discharge the 34 employees named in the complaint on August 25th by its desire to chill the Union activities of employees at its Bayport plant. Accordingly, I find that the discharge of these employees violated Section 8(a)(3) and (1) of the Act.[24] Although some of the employees were not shown to have engaged in union activity, such proof is unnecessary as they were terminated to end the Union activity, *California Bake-N-Serve, Ltd.*, 227 NLRB No. 78, and cases cited therein.

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of Respondent as set forth in Section III above, occurring in connection with the operations described in section I above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes

24. Employees Judd and Burleson credibly testified supervisor Richardson told them on August 26th that a reason for the terminations was the Union. I do not base my finding of discrimination upon this testimony as Richardson did not attend the meetings leading to the decision to terminate and it appears his utterances constituted a statement of opinion rather than known fact. Similarly, I have considered the credible testimony of employee Allbright which reveals supervisor Park told him in September that he had been instructed to refrain from recommending former maintenance employees to other employers and Park informed Allbright that none of the former maintenance employees would be permitted back in the Bayport plant, even when working for a subcontractor. I make no findings concerning this testimony as no violation was alleged.

burdening and obstructing commerce and the free flow of commerce.

V. Conclusions of Law

1. The Respondent, Big Three Industrial Gas & Equipment Co., is an employer engaged in commerce within the meaning of Section 2(6) and 7 of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union activities and sentiments and the activities and sentiments of other employees; by threatening employees with discharge or lack of promotion in order to discourage them from joining or assisting the Union; by promising benefits to employees in order to encourage them to forgo their support of the Union; and by creating the impression that the Union activities of its employees were under surveillance, I find that Respondent has violated Section 8(a)(1) of the Act.

4. By discharging the thirty-four (34) employees named in the complaint on August 25, 1976, I find Respondent has discriminated in regard to the hire or tenure of employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

5. All other allegations of the complaint that Respondent has violated Section 8(a)(3) and/or (1) of the Act have not been sustained by a preponderance of the evidence and are to be dismissed.

6. Joe Park, Gerald Alexander, John Richardson, Ray Osburn, Lynn Reddoch, Albert Lindsay and A. J. Fagan were, at all times material herein, agents of Respondent and supervisors within the meaning of Section 2(11) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent will be required to offer:

T. T. Aldridge
Thomas Allbright
James Bowlin
Jesse D. Burleson
Gary Carrico
John E. Coryell
Richard A. Dickman
James L. Ellis
William Fairless
Alan E. Fowler
Robert M. Fox
Kenneth Gatlin
Tom Hurt
Louren Lamb
Daniel G. Leggett
Jesse Lopez
Richard McBride
Steve McKnight
Robert Molis
Robert Rhoades
Richard Michael Robb
Charles Rodriguez
Talmadge F. Smith
Jeff Stevenson
Ricky Talent
J. K. Trojanowski
Fred Walker
Johnnie M. Williams
Marvin J. Williams
Steve Wylie
Ken Tadlock
Mike Vickery
Lee Judd
Floyd Williams

reinstatement to their former positions, or if those positions no longer exist, to a substantial equivalent position, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which they had been performing; and to place said employees for whom jobs are not immediately available pursuant to the above, on a preferential hiring list according to seniority, to the extent possible. Additionally, Respondent will be ordered to make these employees whole for any loss of earnings they may have suffered by reason of their unlawful termination with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid at the rate of 6 percent per annum. *F.W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, enforcement denied on different grounds, 322 F.2d 913 (C.A. 9, 1963).

Upon the foregoing findings of fact, and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

ORDER

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

25. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Interrogating employees concerning their union activities and sentiments and the activities and sentiments of other employees.

(b) Threatening employees with discharge or lack of promotion if they engage in activities on behalf of the Union.

(c) Promising employees benefits including wage increases, or better working conditions to induce them from becoming or remaining members of the Union or to refrain from giving assistance or support to it.

(d) Creating the impression that the union activities of employees are under surveillance to discourage membership in or activities on behalf of the Union.

(e) Discouraging membership in or activities on behalf of, Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization of its employees, by discharging employees because of their activities on behalf thereof or otherwise discriminating in regard to the hire or tenure of employment or any terms or conditions of employment of its employees.

(f) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer the thirty four (34) employees named in the section of this Decision entitled "The Remedy" immediate and full reinstatement to their former positions or if such positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights previously enjoyed, and make each of them whole for any loss of pay due to the violation against them in accordance with the manner set forth in "The Remedy."

(b) Preserve and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Pasadena, Texas, Bayport plant, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by the Respondent's authorized representative shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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26. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ DONALD R. HOLLEY
Donald R. Holley
Administrative Law Judge

Form NLRB-4727 (9-69) JD-115-77

(Seal) (Seal)

NOTICE TO EMPLOYEES

Posted By Order Of The National Labor Relations Board

An Agency of the United States Government

After a trial in which all sides had a chance to give evidence, an Administrative Law Judge of the National Labor Relations Board has found that we, BIG THREE INDUSTRIAL GAS & EQUIPMENT CO., violated the National Labor Relations Act and we have been ordered to post this Notice.

The Act gives the employees the following rights:

To engage in self-organization, to form, join or assist any union;

To bargain collectively through representatives of their own choosing;

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection; and

To refrain from the exercises of any or all such activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT interrogate you regarding your union activities or sentiments or regarding the Union activities or sentiments of your fellow employees.

WE WILL NOT threaten employees with reprisals because they chose to engage in union activities.

WE WILL NOT promise benefits or better working conditions to dissuade you from participating in union activities.

WE WILL NOT creat the impression that the Union activities of our employees are under surveillance by management.

WE WILL NOT discharge employees for engaging in union activity on behalf of OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights under Section 7 of the Act.

WE WILL offer T. T. Aldridge, Thomas Allbright, James Bowlin, Jesse D. Burleson, Gary Carrico, John E. Coryell, Richard A. Dickman, James L. Ellis, William Fairless, Alan E. Fowler, Robert M. Fox, Kenneth Gatlin, Tom Hurt, Louren Lamb, Daniel G. Leggett, Jesse Lopez, Richard McBride, Steve McKnight, Robert Molis, Robert Rhoades, Richard Michael Robb, Charles Rodriguez, Talmadge F. Smith, Jeff Stevenson, Ricky Talent, J. K. Trojanowski, Fred Walker, Johnnie M. William, Marvin J. Williams, Steve Wylie, Ken Tadlock, Mike Vickery, Lee Judd, and Floyd Williams immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to a substantially equivalent position of employment without prejudice to their seniority or other rights, and WE WILL make each of these employees whole for any

loss of pay he or she may have suffered by reason of our discrimination against them.

BIG THREE INDUSTRIAL
GAS & EQUIPMENT CO.
(Employer)

Dated —— By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, TX 77002 Telephone No. (713-226-4722)

Supreme Court, U. S.
FILED
FEB 15 1979
MICHAEL RODAK, JR., CLERK

No. 78-1090

In the Supreme Court of the United States

OCTOBER TERM, 1978

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO., INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A34) is reported at 579 F. 2d 304. The decision and order of the National Labor Relations Board (Pet. App. A35-A92) are reported at 230 N.L.R.B. 392.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7-A8) was entered on September 15, 1978. A motion for rehearing was denied on October 27, 1978 (Pet. App. A6). The petition for a writ of

certiorari was filed on January 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging all of its maintenance department employees following acts of misconduct by unidentified persons in the department where the dominant motivation for the discharge was anti-union animus.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A2.

STATEMENT

In the summer of 1976,[1] a union organization drive took place at the Company's Bayport plant. On July 14 and 15, twenty-seven employees—primarily from the maintenance department—signed authorization cards with the Union.[2] Ultimately, 33 of the 35 maintenance department employees signed such cards (Pet. App. A47-A48, A64, A10-A11). The Company responded by interrogating employees, threatening them with discharge, and promising benefits to employees to discourage unionization (Pet. App. A49-A59).

[1] All dates are in 1976.

[2] Oil, Chemical and Atomic Workers International Union, AFL-CIO.

On August 17, three maintenance department employees broke a Company rule by leaving the premises while on overtime without punching out or notifying their supervisor. Two employees who were union adherents were suspended for three days; the third, who was not a union supporter, was not disciplined. He was told by a supervisor not to worry because "we're not after you." (Pet. App. A36-A37, A61-A62.)

In this same period, two pieces of machinery were vandalized and parts to a turbine under repair by the maintenance department disappeared. Repair and replacement of these items cost several thousand dollars. (Pet. App. A64-A65.) On August 19, some time after these incidents occurred, supervisory personnel received threatening anonymous telephone calls and one supervisor had shots fired at his house and found sugar in the gas tanks of his cars (Pet. App. A65). On August 19 and 20, the Company received anonymous[3] bomb threats to its plant. No further incidents occurred between August 21 and 25. (Pet. App. A65-A69.) On August 25, the Company, without ascertaining who, if anyone, in the maintenance department was responsible for the incidents, or attempting to deal with these problems by other means,

[3] Although two telephone bomb threats were tape recorded, no conclusive identification of the caller was made. Two witnesses thought the voice was that of Union advocate Mike Robb. The Company's assistant maintenance manager thought it was Jim Bowlin, another maintenance employee who became a Company spy (Pet. App. A70-A74, A53-A55, A13 n.2).

discharged all 34 maintenance workers and subcontracted the work out (Pet. App. A75-A76, A82).

2. On these facts, the Board found that the Company violated Section 8(a)(1) of the Act by unlawfully interrogating, threatening, and promising benefits to employees "to discourage union activity"; and Section 8(a)(3) and (1) by discriminatorily suspending two pro-union employees (Pet. App. A36-A37). The Company does not dispute these findings here.

The Board further found that the Company violated Section 8(a)(3) and (1) by "terminat[ing] 34 employees, its entire maintenance work force, * * * in order to dissipate support for the Union" (Pet. App. A36). The Administrative Law Judge, whose decision in this respect was adopted by the Board, found that the reason asserted by the Company for the action—*i.e.*, a desire to rid itself of a workforce which had engaged in misconduct—was a pretext. He noted that the Company had (Pet. App. A82):

> failed to prove that it had reasonable cause to believe that members of the maintenance crew engaged in unprotected activity. [The Company] merely suspected some employees may have engaged in unprotected activity and chose to terminate all of them to end the Union activity and to possibly end the bomb threats and allied behavior.

He added that the pretextual nature of the reason assigned by the Company for the mass terminations is further revealed (*ibid.*):

> by the fact that it terminated all maintenance employees rather than just those it suspected in connection with the August 19th and 20th activities [and that it] knew that almost everyone in the maintenance department had signed union cards and it suspected that only a few employees in this department had been involved in the unprotected activity * * *.

The Board ordered the Company, *inter alia*, to reinstate the 34 unlawfully discharged employees, with back pay (Pet. App. A85-A86, A88).

3. The court of appeals enforced the Board's order (Pet. App. A33). The court found "abundant support" for the Board's finding that "anti-union animus pervaded the Company's action" in discharging its maintenance employees and subcontracting out the maintenance work (Pet. App. A29). Moreover, while the court found, contrary to the Board, that the Company was also motivated by an "honest business purpose" (Pet. App. A30) to rid itself of a workforce which it believed had engaged in misconduct, it further found that this business justification was not "dominant," but rather "subsidiary to the force of union animus in triggering the mass discharge" (Pet. App. A31). "Accordingly, the motivational predicate for § 8(a)(3) violations is established" (*ibid.*).[4]

[4] The court noted that there is disagreement among the circuits as to whether, in mixed motive situations, it is sufficient to show that the anti-union motive in part contributed to the decision or was at least "reasonably equal" to the lawful motive, or whether it is necessary to show that the decision

The court distinguished the situation here from that in *Johns-Manville Products Corp.* v. *NLRB*, 557 F. 2d 1126 (5th Cir. 1977), cert. denied, 436 U.S. 956 (1978), where it had upheld the employer's right to discharge all of its employees because of widespread acts of sabotage in the plant. The court noted that there, unlike here, the misconduct was so severe as "to become functionally equivalent to a strike" (Pet. App. A27). Moreover, in *Johns-Manville*, unlike here, there was a "complete absence of anti-union motivation" (Pet. App. A28), and the employer had "exhausted various alternatives before resorting to the unusual and severe solution of unit-wide job termination" (Pet. App. A31).

ARGUMENT

The Board found that the Company discriminated against its maintenance employees, in violation of Section 8(a)(3) and (1) of the Act, by discharging them and subcontracting out their work as a reprisal for their union activity, rejecting as a pretext the Company's contention that it was motivated by a desire to rid itself of a workforce which had engaged in misconduct. The court of appeals found that, while the latter consideration did in fact play a part in the Company's decision, the dominant consideration was the employees' union activity—*i.e.*, the business justification was "subsidiary to the force of union animus

would not have been made "but for" the anti-union considerations. The court concluded that "even a 'but for' test would be met in the instant case." (Pet. App. A30-A31 n.15.)

in triggering the mass discharge" (Pet. App. A31); accordingly, it sustained the Board's unfair labor practice determination. The basic question presented is whether substantial evidence supports that determination. Such an issue does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, there is ample record support for these findings (see Pet. App. A29).

In an effort to present a legal question for review, petitioner contends that this Court should resolve the disagreement among the circuits as to whether a "but for" or a less stringent test applies in mixed motive cases under the National Labor Relations Act (Pet. 13-24). However, as the court of appeals properly found (note 4, *supra*), there is no need to reach that issue here, for the evidence of anti-union motivation is sufficient to satisfy even the more stringent "but for" test.[5] Moreover, since the misconduct occurred in the course of the employees' union activity, the Company, even if motivated solely by a desire to stop

[5] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), has no bearing on the issue raised here. There, the Court ruled that if a defendant rebuts a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 by presenting a legitimate business justification for its employment decision, the burden shifts to the plaintiff to show that the "business justification" is a pretext for a discriminatory motive. Here, the Company's business justification was insufficient to rebut the evidence showing that the discharges would not have occurred "but for" the employees' union activity. The evidence clearly established anti-union animus, which predominated over the Company's showing.

such misconduct, could not lawfully discharge all the employees, but only those who were identified as having engaged in the wrongdoing. See *Stewart Die Casting Corp.* v. *NLRB*, 114 F. 2d 849, 856 (7th Cir. 1940); *NLRB* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 268 (6th Cir. 1945). See also *NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24 (1964). The Company made no attempt here, of course, to distinguish between the guilty and the innocent; it simply inflicted "punishment on the many for the misdeeds of a few" (Pet. App. A25).[6]

[6] Finally, there is no merit to petitioner's contention (Pet. 24-31) that the court of appeals impermissibly substituted a new standard for that utilized by the Board. While the court rejected the Board's finding that the Company's asserted motive for the discharges was "pretextual" (Pet. App. A-82), it nonetheless agreed with the Board that there was sufficient evidence of anti-union animus to warrant the conclusion that the discharges were violative of Section 8(a)(3) and (1) of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
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FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 287005 331